154 Filed Nov 27 1950

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1744-50

Charge Vio. 2-192 U.S.C.

UNITED STATES
v.
THOMAS QUINN, *Defendant*

Plea of Defendant

On this 24th day of November, 1950, the defendant Thomas Quinn, appearing in proper person and by his attorney Alan Rosenberg, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

By direction of

BURNITA S. MATTHEWS
Presiding Judge
Criminal Court #1

HARRY M. HULL, *Clerk*
By C. H. MILSTEAD
Deputy Clerk

Present:

UNITED STATES ATTORNEY
By CHARLES B. MUERAY
Assistant United States Attorney

H. B. SMITH
Official Reporter

* * * * * * * * * *

155 Filed Dec 19 1950

Motion to Dismiss Indictment and for Other Appropriate Relief

The defendant above named moves, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, on the indict-

ment herein, on the affidavit of Thomas Quinn, verified December 18, 1950, the affidavits of David Scribner, Esq., and the affidavit of Albert J. Fitzgerald, all verified December 16, 1950, that the indictment be dismissed, or that appropriate relief be granted, upon the following grounds:

1. Section 192 of Title 2 of the United States Code is unconstitutional on its face and as construed and applied herein in that it violates the Constitutional privilege against self-incrimination contained in the Fifth Amendment to the Constitution of the United States.

2. Section 192 of Title 2 of the United States Code is unconstitutional on its face and as construed and applied herein in that it exceeds the bounds of the constitutional power of the Congress to investigate in aid of its legislative jurisdiction.

3. Section 192 of Title 2 of the United States Code is unconstitutional on its face and as construed and applied herein in that it is vague and indefinite, and fails to provide an ascertainable standard for conduct in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

156

4. Section 192 of Title 2 of the United States Code is unconstitutional on its face and as construed and applied herein in that it violates the First Amendment to the Constitution of the United States.

5. Section 121, Legislative Reorganization Act of 1946, Subsection (Q)(2) and House Resolution 5 of the 81st Congress creating the House Committee on Un-American Activities are unconstitutional on their face and as applied and construed herein:

(a) in that they violate the constitutional privilege against self-incrimination contained in the Fifth Amendment to the Constitution of the United States.

(b) in that they are vague and indefinite and fail to provide an ascertainable standard for conduct in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

(c) in that they violate the First, Ninth and Tenth Amendments to the Constitution of the United States.

(d) in that they constitute a Bill of Attainder.

6. The indictment fails to charge an offense under the laws of the United States.

7. The indictment fails to charge an offense under the laws of the United States in that the questions asked exceeded the bounds of legislative inquiry and were not pertinent to any question properly under inquiry before the Committee.

8. The indictment fails to state an offense under the laws of the United States in that it fails to allege that the defendant was directed by the Subcommittee to answer the questions set forth in the indictment.

9. The indictment violates the Fifth Amendment to the United States Constitution and Rule 7 of the Federal Rules of Criminal Procedure in that it fails to provide the defendant with adequate notice of the offense with which he is charged.

157 10. The indictment is void and illegal in that there are less than 12 members of the Grand Jury which voted the indictment who were impartial and free from prejudice or bias against the defendant, and therefore as to this defendant the alleged Grand Jury was illegally constituted. The indictment should be dismissed or in the alternative the defendant should be granted a hearing at which he can offer proof that bias or prejudice existed on the part of more than 11 of the Grand Jurors.

11. The indictment is improperly and illegally drawn and is prejudicial to the defendant in violation of the Federal Rules of Criminal Procedure in that the alleged acts set forth in the several counts of the indictment were questions directed all to one subject of inquiry and were simultaneous and continuous acts constituting only one alleged offense which could only be charged in a single count.

12. The indictment as drawn places the defendant in double jeopardy for a single offense in violation of the Fifth Amendment to the United States Constitution.

And in the alternative, the defendant moves the Court for an order directing the United States Attorney for the District of Columbia to serve and file a Bill of Particulars setting forth in detail the answers to the following:

1. By what authority and in what manner was the "Subcommittee" on Un-American Activities of the House of Representatives appointed or designated?

2. What was the specific question then under inquiry before the "Subcommittee"?

158 3. What facts did each question which is set forth in each count of the indictment seek to elicit in respect to the question then under inquiry before the "Subcommittee"?

4. State all the questions asked and answers made by the defendant at his appearance before the "Subcommittee" at the hearing on August 11, 1949.

DAVID SCRIBNER
Office & Post Office Address
11 East 51st Street
New York 22, New York

ALLAN R. ROSENBERG
Office & Post Office Address
1741 K Street, N.W.
Washington, D. C.

Attorneys for Defendant

Dated: December 16, 1950

* * * * * * * * * *

160 Filed Dec. 19, 1950

Affidavit of Albert J. Fitzgerald

STATE OF NEW YORK
COUNTY OF NEW YORK, *ss:*

ALBERT J. FITZGERALD, being duly sworn, deposes and says:

I am the General President of the United Electrical, Radio and Machine Workers of America (UE), hereafter

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 8

THOMAS QUINN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 13, 1953
CERTIORARI GRANTED JUNE 7, 1954

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,081

THOMAS QUINN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the District of Columbia.

JOINT APPENDIX.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS.

506½ Filed May 18 1951

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1744-50

UNITED STATES OF AMERICA

v.

THOMAS QUINN

Notice of Appeal

Name and address of appellant Thomas Quinn, 201 Beech St., E. Pittsburgh, Penna.

Name and address of appellant's attorney Allan R. Rosenberg, 707-711 Columbia Bldg. David Scribner, 11 E. 51 St., N.Y.C.

Offense Violation of § 192, 2 USC

Concise statement of judgment or order, giving date, and any sentence Guilty of above, judgment May 28, 1951 sentenced 6 mos., $500 fine.

Name of institution where now confined, if not on bail ....

I, the above-named appellant, hereby appeal to the United states Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date May 18, 1951

....
Appellant

ALLAN R. ROSENBERG

Attorney for Appellant.

* * * * * * * * * *

153 Filed in Open Court Nov 20 1950

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

(Grand Jury Impaneled on October 3, 1950 and Sworn in on October 4, 1950)

Criminal No. 1744-50
Grand Jury Original
(2 U.S.C. 192)

UNITED STATES OF AMERICA
v.
THOMAS QUINN

Indictment

The Grand Jury charges:

On August 11, 1950, at and within the District of Columbia, a duly created sub-committee of the Committee on Un-American Activities of the House of Representatives was conducting an inquiry pursuant to authority conferred upon it by law, and particularly by subsection (q)(2), Section 121 of The Legislative Re-organization Act of 1946, 60 Stat. L. p. 828 and House Resolution 5 of the Eighty-first Congress. The defendant Thomas Quinn appeared as a witness before that sub-committee at the place and on the date above stated and was asked the question whether he was or had ever been a member of the Communist Party, which question was pertinent to the question then under inquiry before the said sub-committee; and the defendant Thomas Quinn then and there refused to answer that question.

GEORGE MORRIS FAY
United States Attorney in and for the District of Columbia

A True Bill:

LLOYD B. WILSON, JR.
Foreman

* * * * * * * * * *

referred to as the UE, a labor union of workers in the electrical, radio and machine manufacturing industry. The UE represents over 300,000 employees in that industry.

This affidavit is in support of the motion of the defendant herein, an officer and member of the UE, to dismiss the indictment.

It is my understanding, and I have been so informed by counsel, that a Congressional Committee, under our Constitution, does not have unlimited power to conduct investigations into the affairs of private citizens and their organizations. It is my understanding that a Congressional Committee may carry on an investigation only in aid of legislative functions properly within the constitutional limitations on Congressional power.

The investigations and hearings of the House Un-American Activities Committee out of which this indictment arose, exceeded the bounds of constitutional power and were directed toward objectives totally unrelated to the legitimate legislative business of the Committee or the House of Representatives.

The investigation and hearings of August 9, 1949 to which defendants Thomas Fitzpatrick, Frank Panzino and Thomas Quinn, also members of UE, were subpoenaed were openly directed by the Committee toward the objective of interfering with and influencing the outcome of a local union election then pending in Pittsburgh, Pennsylvania. The objective of the Congressional inquiry was obviously to influence the outcome of this election. Such an inquiry lies far beyond the constitutional legislative bounds of the Committee or the Congress.

The *Pittsburgh Press,* on August 5, 1949, stated in respect to the objectives of this investigation:

> "Other Committee sources said it was their understanding *that the entire point of the hearing was to disclose the Communist infiltration into the powerful local prior to the election so the members would know for whom they were voting.*

"They said a postponement would defeat the primary objective of the investigation." (*Pittsburgh Press*, Aug. 5, 1949) (Emphasis supplied)

The *Pittsburgh Post-Gazette* on August 7, 1949 reported the opinions of members of Congress themselves that the Committee investigation was directed to no legitimate legislative function of Congress:

161 "PROBE TIED TO UE ELECTION"

by Ingrid Jowell

"A week from today Local 601 of the United Electrical Workers Union, the big Westinghouse unit, will elect delegates to the UE Convention, to be held in Cleveland Sept. 19.

"During this coming week the House Un-American Activities Committee will hold hearings in Washington on alleged infiltration of Communists into Local 601.

"The Un-American Activities Committee investigation was sought from Representative Francis Walter, Democrat, Easton, Pa., a committee member, by the Reverend Charles Owen Rice, a Pittsburgh Jesuit priest, who is a leader of the Association of Catholic Trade Unions, and by two lay members of that association, Ernest Vida and John Duffy.

"The Pittsburghers said they feared Communist infiltration in Local 601 would endanger production of and research on radar.

"Western Pennsylvania congressmen believe, however, the investigation was requested at this time to influence next Sunday's election and ultimately the election of the international officers at the convention.

"The congressmen are divided as to whether this outside influence is a good thing. The UE International does not have a constitutional provision barring Communists."

". . . .

"At stake in next Sunday's election at Local 601 are about 150 delegate votes. There will be about 4,000 votes at the convention in Cleveland, but the question

of whether to retain or change the international leadership is a burning one, not only in Pittsburgh, but in other industrial centers where UE has a large membership.

"*So even 150 votes could be a decisive factor in the international's election at the convention, our congressmen believe.*"

The Committee itself never disavowed this objective. According to the press, Congressman Walter, a member of the Committee, conceded that the Pittsburgh investigation was instigated at the request of a clergyman interested in assisting an inner union clique in its attempt to win a local election. (See the *Pittsburgh Post-Gazette,* July 31, 1949.) Even during the hearing itself Committee members acknowledged that they had consulted representatives of this inner union clique in determining the objectives and timing of the hearings. (Hearings, p. 605). Throughout the entire hearing it was made perfectly clear that the objective of the investigation was to provide a sounding board for one faction in an internal union fight so as to influence and determine the course of a local union election. (Hearings, p. 610). Such an investigation was not in aid of legislation; it was openly and frankly designed to interfere in and influence the results of a local trade union election. Such an objective lies totally beyond the constitutionally defined powers of the Committee or the House of Representatives.

162 The hearings held on Dec. 5 and 6, 1949, which resulted in the indictments of the defendants Julius Emspak and James J. Matles were a continuation of the investigation launched by the Committee during the summer of 1949, and were similarly totally beyond the constitutional power of the Committee, being directed toward objectives foreign to the legislative functions of the Congress.

The announced purpose of the Dec. 5 and 6th hearings insofar as they affected Mr. Emspak and Mr. Matles was to inquire into a possible violation of the Taft-Hartley Law.

On November 17, 1949, the *New York Times* ran a story which revealed the objective of the Committee's hearings as "looking into the validity of non-Communist affidavits filed by officers of the left wing United Electrical, Radio & Machine Workers of America."

> "The House Committee on Un-American Activities disclosed last night in Washington that it was looking into the validity of non-Communist affidavits filed by officers of the left wing United Electrical, Radio & Machine Workers of America.
>
> " . . . A spokesman for the Congressional investigating committee said it had issued subpoenas for Julius Emspak, Secretary-Treasurer, and James J. Matles, the Union's Director of Organization, before a subcommittee on November 29th. The spokesman indicated that the committee wanted to question the two officials about the affidavits they submitted to the National Labor Relations Board under the provisions of the Taft-Hartley Act. . . .
>
> "The Committee said the subpoenas had been issued three weeks ago. This was just after the Union had filed affidavits with the NLRB and two weeks before the CIO revoked its charter."
>
> (*New York Times*, Nov. 17, 1949)

The entire course of the actual hearings revealed the objective of the Committee in seeking to disclose a possible violation of Section 80 of the Criminal Code for false statements made in the so-called Taft-Hartley non-Communist affidavits. (See transcript of hearings.)

This investigation of the Committee was in its nature clearly judicial. It was totally in excess of the power of the Committee or the House of Representatives. The Committee cannot compel the divulgence of information for the purpose of ascertaining whether a crime has been committed as the basis for a criminal prosecution. This is not the function of a Congressional Committee.

The Dec. 5 and 6th Congressional hearings, just as the summer hearings, were quite frankly designed not to further any legislative objective, but rather to intervene openly in the interest of one faction in a union election, and to attempt to prepare criminal prosecutions of the leaders of the union.

163 The last hearings involving members of UE, held in July 1950, out of which the indictments of Esther Tice and Talmadge Raley arose, reveal in a startling fashion that the objective of the investigation was not to assist the legitimate legislative functions of the Congress, but rather to harass and discredit UE members and their union.

The July hearings were held at the request of the *Cincinnati Enquirer,* a notorious anti-labor newspaper. As the *Enquirer* itself stated:

> "Eighteen months of research and diligent digging by James Ratliff, *Enquirer* reporter, and associates on the staff reached fruition when the House Committee turned the witness stand over to witnesses introduced by the *Enquirer.*"
>
> (*Enquirer,* Sunday, July 16, 1950.)

The *Enquirer* sought to have hearings held to serve as a privileged forum for its own partisan articles.

As the *Akron Beacon Journal* reported on July 23, 1950:

> "The story behind the Ohio Un-American Committee 1950 hearing is an interesting one. Last year the Cincinnati Enquirer began a series of articles about Communism in Cincinnati, but because of fear of libel, it used practically no names. In an effort to get the names on the record in the committee it brought its star witness Cecil Scott to Washington and tried to get the committee to hear him.
>
> "The committee refused because Scott had served time for forgery and had also been a mental patient.
>
> "The other Cincinnati papers heard about the fiasco and gave the Enquirer such a roasting that it redoubled its efforts to get a hearing.

"Helped along by some Republicans who saw the *political possibilities*, and provided with more acceptable witnesses, *the paper was finally able to get the committee to hold the hearing.*"

Despite the obvious incompetence of Scott's testimony the Committee not only proceeded to hold the hearings but centered the entire questioning of UE member Tice upon a crude forgery which Committee member Walter later charged was perpetrated by Scott, the star witness of the *Enquirer*. As Congressman Walter's statement reveals, not only was the Committee fully aware of the utter incompetence of the witness initiating the hearing, but also the Committee was aware that a forged document was being used to frame, smear and incriminate UE members.

The *Cincinnati Post* of October 23, 1950 reported in full Congressman Walter's important revelations:

"A U.S. representative charged Monday that Cecil D. Scott altered a document before presenting it as evidence to the House committee on un-American activities. The congressman is Rep. Francis I. Walter (D., Pa.). He is vice chairman of the committee.

164 "Rep. Walter said he would recommend the matter be referred to the U.S. attorney in Washington for action when Congress reconvenes in November.

"Scott was the chief original source of information for James Ratliff, Cincinnati Enquirer reporter, who wrote a series of stories on Communism last February and March.

"Scott testified for five days last summer before the House committee. His testimony never has been released and, according to several committee members, probably never will be.

"Rep. Walter conducted most of the questioning last summer when the committee held a Washington hearing on Communism in Cincinnati and other Ohio cities.

"Rep. John McSweeney (D., Wooster, O.) also said that Scott had falsified part of his testimony.

"Apparently the chief investigation of Scott's testimony centered around a letter or letters allegedly written to Esther Tice, former organizer for the

United Electrical, Radio & Machine Workers of America.

Some Not True

"In announcing that he would recommend the matter he referred to the U.S. attorney for action, Mr. Walter said:

" 'I do know that some of his testimony was not true. Somebody apparently altered a document to lend significance to it. After Scott had offered us what he said was a copy of the letter we obtained the original.
" 'He said what he gave us was a copy. It had been added to. He said he had obtained the letter from a purse or a file and had taken it from the office and copied it, then put the original back.

Obtained Original

" 'The committee got hold of the original and the significant part was not in the original letter.
" 'Our investigators have checked some other parts of his testimony. I do know that, because of that part of his evidence which we found to be false some of us believe that his whole testimony is not entitled to credence.
" 'That fact and the fact he was in a mental institution does not lend credence to his testimony.

Will Recommend Action

" 'I think action should be taken. If he deliberately altered or changed a document to lend significance to it, it should be referred to the U.S. attorney.
" '*I will so recommend when Congress convenes.*'
"In speaking of Scott's reliability, Rep. Walter's colleague, Mr. McSweeney said he also was aware a document had been changed."

(*Cincinnati Post*, October 23, 1950)

The conduct of the Committee in these hearings, culminating not in a prosecution of those who perpetrated the forgery, but in a prosecution of the victims of the
165 forgery reveals in a most striking manner the fact apparent in the earlier hearings, that the Committee

was not conducting investigations in good faith designed to assist in legitimate legislative functions of the Congress, but rather had as its objective non-legislative purposes directed toward interference in the internal affairs of a trade union and the instigation of criminal prosecutions against its leaders and members.

ALBERT J. FITZGERALD

Sworn to before me this 10th day of December, 1950,

DAVID RATNER.

David Ratner, Notary Public, State of New York, No. 41-3211050, Qualified in Queens County, Certs. filed with N. Y., Kings, Bronx and Westchester Co. Clks. Queens, King, N. Y. & Bronx Co Registers, Commission Expires March 30, 1951.

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166 Filed December 19, 1950

Affidavit of David Scribner

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

DAVID SCRIBNER, being duly sworn, deposes and says:

I am one of the attorneys for the defendant named in the above bill of indictment.

This affidavit is made in support of the motion to dismiss the indictment on the ground that it is void and illegal in that the Grand Jury which voted the indictment was illegally constituted as to this defendant.

I have been advised that the Grand Jury records in this Court will indicate that 10 of the 23 members of the Grand Jury which voted the indictment against this defendant were employed by the government of the United States, and that two of the Grand Jurors are listed in the records as "unemployed."

Information about the employment of the wives or husbands or children of the Grand Jurors can be obtained

only from examination of the Grand Jurors at a hearing or from examination of records not presently available to the deponent.

This indictment arises out of an investigation and inquiry by the House Committee on Un-American Activities. The questions in the indictment referred to alleged Communist activities or association. On information and belief, the transcript of the hearing before the "Subcommittee" of the House Committee on Un-American Activities was made available to the Grand Jury.

167 The above facts, among others, in the context of Executive Order 9835, known as the President's Loyalty Order, which order includes as one of the criteria for continued employment the absence of any "sympathetic association" with the Communist Party or other activities alleged to be "subversive", require that the defendant be permitted by the Court to inquire further into actual and implied bias and prejudice on the part of the Grand Jurors.

I respectfully call the attention of the Court to the decision of the Supreme Court of the United States in *Dennis* v. *United States,* 339 U.S. 162, in which opinion the Court held that a defendant has the right to show by proof both actual and implied bias on the part of jurors.

Under the applicable law the defendant must be given an opportunity to demonstrate and inquire into the effect of the President's Loyalty Order upon government employees in general and those in the Grand Jury in particular. The defendant must be given an opportunity to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of government employees including their activities as Grand Jurors or the activities of spouses as Grand Jurors in respect to issues like those involved in the present indictments. I respectfully call to the attention of the Court the threats of the House Committee on Un-American Activities against the Attorney General if indictment in contempt cases were not returned (see 93 Congressional Record 3815, 3932).

In this connection Mr. Justice Jackson's description of the atmosphere in Washington in 1948 insofar as it affects government employees in *Frazier* v. *United States,* 335 U.S. 497, is certainly even more significant at the present date.

The passage of the Internal Security Act of 1950 and in particular the specific reference to government employees and the sanctions placed therein upon "sympathetic association" by government employees with alleged Communist activities created more than a reasonable presumption of a sufficient influence upon such government employees so as to grant the defendant a hearing at which actual or implied bias and prejudice is shown to be present in the respective Grand Jurors.

168 Under these circumstances the defendant has the right, as the Supreme Court stated in *Dennis* v. *United States,* cited *supra,* to bring "circumstances . . . to the Court's attention which would convince the Court that government employees would not be suitable jurors" in this particular proceeding. Under the mandate of the Supreme Court the defendant likewise has a right to ascertain whether the spouses or relatives of other Grand Jurors are government employees, particularly since they may be employees of the very Congressional Committee here involved. Similarly the defendant has the right to ascertain whether Grand Jurors listed in the records as "unemployed" are now seeking government employment.

Therefore, I respectfully urge the Court to dismiss the indictment and in the alternative that the defendant be granted a hearing pursuant to Rule 12(b) (4) of the Federal Rules of Criminal Procedure to prove by evidence to the Court that more than 11 of the Grand Jurors were actually or impliedly biased and prejudiced against the defendant and that the indictment is therefore void and illegal.

DAVID SCRIBNER

Sworn to before me this 16th day of December, 1950.

DAVID RATNER

David Ratner, Notary Public, State of New York, No. 41-3211050, Qualified in Queens County, Certs. filed with N. Y., Kings, Bronx and Westchester Co. Clks. Queens, King, N. Y. & Bronx Co. Registers. Commission expires March 30, 1951.

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169 Filed December 19, 1950

Affidavit of David Scribner

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

DAVID SCRIBNER, being duly sworn, deposes and says:

1. I am one of the attorneys for the defendant named in the above bill of indictment.

2. I have consulted with the defendant in respect to the charges set forth in the indictment.

3. This application is made in good faith for the purpose of informing the defendant of the particular offense upon which he stands charged.

4. The defendant cannot properly answer the charge set forth in the indictment or move in respect thereto without the additional information asked for in the request for a bill of particulars.

5. Without the information requested the defendant cannot properly prepare a defense.

DAVID SCRIBNER.

Sworn to before me this 16th day of December, 1950,

DAVID RATNER.

David Ratner, Notary Public, State of New York, No. 41-3211050, Qualified in Queens County, Certs. filed with N. Y., Kings, Bronx and Westchester Co. Clks. Queens, King, N. Y. & Bronx Co. Registers, Commission Expires March 30, 1951.

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170 Filed Dec 19 1950

Affidavit

STATE OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss:

THOMAS QUINN, being duly sworn, deposes and says that he is the defendant in the present action.

I am and have been employed by the Westinghouse Electric Corporation at East Pittsburgh, Pennsylvania. For a number of years I have been a member or officer of the United Electrical, Radio and Machine Workers of America (UE).

I was served with a subpoena on August 3rd, 1949, and appeared and testified before the Un-American Activities Committee on August 11th, 1949 (Exhibit #1). On the basis of newspaper reports and statements of members of the Un-American Activities Committee including that of Mr. Wood, the chairman, prior to the time of the hearing, among other things, it was clear that the purpose of this investigation was to determine whether or not certain individuals associated with UE Local 601 were affiliated with the Communist Party. It was for this reason that I asserted my privilege against self-incrimination under the Fifth Amendment. (Exhibits 2, 3, 4)

The announced intention of the Committee was confirmed by Mr. Tavenner, counsel of the Un-American Activities Committee, in his opening remarks when he stated

171 "The purpose of this hearing is to inquire into the question of Communist affiliation or association of certain members of Local 601 of the UERMWA-CIO which is engaged in work at industrial plants important to the national defense". (Exhibit #1, p. 541)

The testimony of the witnesses, Russell, Kornfeder, Copeland, Peeler, Seese and Glass and the questions asked by the Committee as to my alleged membership in the Communist Party confirmed to me that the announced purpose of the Committee's hearing was being adhered to.

I knew that the government was engaged in trying 11 leaders of the Communist Party for violation of the Smith Act, including the charge of membership in the Communist Party. (Exhibit 5) I knew that this was not an isolated affair, that the federal government through statements issued by the FBI spokesmen and others indicated there was the full intention of proceeding against individuals who were alleged to be members of or associated with the Communist Party. I had reasonable grounds to fear that any questions seeking answers that might indicate membership in or affiliation with the Communist Party might be used as a basis for prosecution against me under the Smith Act and other related federal statutes, and that the Committee had this very point in mind when asking the questions referred to in the indictment against me. (Exhibits 6, 7) The Committee stated its files were used by the government's investigators, and the Committee had urged prosecution under the Smith Act.

It was for these reasons that I fully supported and incorporated into my testimony the statement of Mr. Fitzpatrick in which he responded to questions as to Communist affiliation by asserting his rights under the First and Fifth Amendments. I clearly stated that I accepted in its entirety the position of Mr. Fitzpatrick as he testified before the Un-American Activities Committee on August 10th, 1949 which included assertion under the Fifth Amendment against self-incrimination. I particularly took note of the testimony of a number of the Committee's friendly witnesses in which they alleged I was a member of the Communist Party. Had I answered yes to the question propounded by the Committee, I would have faced the
172 danger of prosecution under the Smith Act. Had the answer been no, it is clear that I would be facing the danger of prosecution under the perjury statutes. Having a substantial and reasonable fear that a yes or no answer to the question propounded might result in criminal prosecution against me, I stood by my original assertion

of the Fifth Amendment as protection against self-incrimination.

By the nature of the response of the Committee members to my assertions of the privilege against self-incrimination, the Committee recognized my right to stand by this constitutional privilege.

It was further my fear that as one of the leaders of UE Local 601, it was the Committee's desire to obtain information which could enable them to institute criminal proceedings against me, and by so doing they would attempt to serve the interests of a dissident group within the union in the course of an election campaign for delegates to the Convention of the UE.

Mr. Case, one of the members of the Un-American Activities Committee, disclosed the purposes of that Committee when he discussed the question of contempt citations against me and others on the floor of the House on August 10th, 1950 and stated as follows:

"In the main our questions related to the very points on which the eleven persons were convicted under the Smith Act, to wit, activity as Communists in advocating the violent overthrow of the government or preparations for it". (Congressional Record, Vol. 96, No. 158, August 10, 1950, p. 12447).

THOMAS QUINN

Sworn to before me this
18th day of December, 1950.

EDWARD J. BAIRD
Notary Public

(Seal)

My commission expires April 18, 1953

* * * * * * * * * *

QUINN EXHIBIT #2

(P. 23)

Communism Indicated in UE, Prober Claims

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

THE DAILY NEWS

Is More Than a Newspaper—It's a Community Institution

McKEESPORT, PA., WEDNESDAY EVENING, AUGUST 3, 1949

Vol. 130, No. 28 36 PAGES THE ASSOCIATED PRESS UNITED PRESS ASSOCIATIONS NAL NEWS SERVICE

WEATHER TONIGHT
Cloudy, Scattered Showers.

WEATHER TOMORROW
Cloudy, Not Quite So Warm.

Union Heads Subpenaed by House Group

Right and Left Faction Leaders to Testify Next Week

By The United Press

WASHINGTON, Aug. 3.—Chairman John S. Wood, announced today that the House Un-American Activities Committee has received information "indicating Communist influences" in the CIO Electrical Workers Union in the Allegheny County area.

Wood said the committee is planning hearings into the whole situation. The Georgia Democrat said the legislators want to determine whether industrial plants engaged in defense work should be required by law to set up security standards for the protection of government secrets.

The Communist influences in the Allegheny County local of the Electrical Workers Union could affect vital and strategical industrial plants," Wood said.

Report 'Erroneous'

Wood described as "erroneous" an earlier report that the committee has subpenaed the records of Electrical Workers Local 601. This report was made earlier this morning by a committee official.

Subpenas were drawn up for service on right and left wing faction leaders of the huge local. They will appear before an inquiry Monday and Tuesday into charges of Communist infiltration into the Union.

Those from the left wing group include Thomas J. Fitzpatrick, chief steward and former local president; Robert Wishner, Frank Panzino and Tommy Quinn.

Right wingers include Stanley Glass, recording secretary; Charles Copeland, business agent; William Peeler, division steward and executive board member and Blair Seese, chairman of the Sick and Accident Committee.

Taken by Surprise

Philip Conahan, right wing leader and president of the 17,000-member local, said the committee's action took his group "completely by surprise."

Glass said:

"It's about time the committee looked into the Commie infiltration of our local."

The investigation had been anticipated after Rep. Francis Walter, Easton, Pa., Democrat, reported that the Communists had directed a strong undercover organizing move at the local.

Walter said as the manufacturer of equipment for an $85,500,000 radar warning network, Westinghouse would be endangered by Communist infiltration.

Union Secretary Ready to Testify

Full co-operation with the House Un-American Activities Committee was promised today by Stanley Glass, recording secretary and custodian of records for Local 601, CIO United Electrical Workers.

"I'll be in Washington Monday with the union's records and I am going to tell all I know," Glass

(Continued on Page 14, Col. 1)

FILED

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The Weather
Partly cloudy Wednesday with scattered showers and thunderstorms.
(Weather Detail on Page 18)

Pittsburgh Post-Gazette

One of America's Great Newspaper

Late City Edition
Largest Circulation of Any Pittsburgh Daily Newspaper

VOL. 23—NO. 2 | In Three Sections | WEDNESDAY MORNING, AUGUST 3, 1949 | Telephone ATlantic 6100 | FIVE CENTS

QUINN EXHIBIT #3

PROBERS SUBPENA RECORDS OF UE

Four Top Leftists Of Westinghouse Local Also Called

House Un-American Activities Committee Orders Union To Produce Books Next Week

The House Un-American Activities Committee last night called for the appearance in Washington next Monday and Tuesday of the records of the CIO Westinghouse Local 601, United Electrical Workers, and several of its so-called left-wing leaders.

A representative of the committee appeared at the union's headquarters with the batch of subpenas naming Thomas J. Fitzpatrick, chief steward; Robert Wishner, Frank Panzino and Tommy Quinn, all left wingers.

Follows Exposure

Fitzpatrick could not be reached and the others would not comment.

The reopening of the House committee's investigation followed recent disclosure by Representative Francis Walter, Democrat, of Easton, Pa., that a clergyman had reported members of Local 601 are being converted to Communism by an intensive drive under out-of-town Communist leaders.

In Vital Plant

The local last December replaced Fitzpatrick as president with a "rank and file" leadership, headed by Conahan. Another election campaign is coming up soon.

Since Westinghouse is a large manufacturer of radar equipment, now being used to provide warning bases circling the country, Mr. Walker said Communists in such plants could easily sabotage the $85,500,0000 project.

The congressman indicated the committee would make a Pittsburgh survey and likely subpena witnesses before Congress adjourned.

FILED
DEC 19 1950
HARRY M. HULL, CLERK
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SUNDAY, AUGUST 7, 1949

(QUINN Exhibit #4)

Hunt for Reds In UE to Open On Tuesday

Right, Left Factions Called to Washington

From Press Washington Bureau

WASHINGTON, Aug. 6—The House Un-American Activities Committee will open an investigation into alleged Communist infiltration into Local 601, CIO United Electrical Workers, here Tuesday.

Local 601 represents 16,500 employes of the East Pittsburgh plant of the Westinghouse Electric Corp.

On Aug. 14, the union will elect delegates to the annual UE convention.

The committee, overlooking charges that the inquiry was "rigged" by "outsiders" and quislings within the union," and ignoring postponement pleas of left-wingers, has summoned four right-wing and four left-wing leaders of Local 601.

They will hear accusations by the right wingers, and will give the left-wing delegation a chance to answer the question of whether they are or are not Communists.

The four right-wing leaders called are Charles Copeland, Stanley Glass, Blair Seese and William Peeler. The left wingers are Thomas J. Fitzpatrick, Robert Wishner, Frank Panzino and Thomas Quinn.

The hearings are scheduled to last two days.

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P. 25

FILED
DEC 19 1950
PATTY M. NOLL, CLERK

25

QUINN EXHIBIT #5

Grand Jurors Accuse Party's National Board Of Planning Violence

Wallace put on spot by Reds arrest. House probe. Pages 5 and 8.

NEW YORK, July 2 1(UP)—Four members of the 12-man "Politburo" of the American Communist Party indicted for plotting the overthrow of the Government by force and violence were still at large today.

FBI agents expected their arrest by nightfall.

Six top-ranking members of the American Communist Party, including William Z. Foster and Eugene Dennis, were arrested yesterday shortly after the indictments were returned by a Federal grand jury.

Foster is national chairman and Dennis is general secretary of the Communist Party.

A seventh, Carl Winters, was arrested in Detroit, and an eighth surrendered in New York today

Those arrested here, in addition to Foster and Dennis, are:

John Williamson, Henry Winston, Jack Stachel and City Councilman Benjamin Davis.

The eighth member of the group was John Gates, 34, editor of the Daily Worker. He surrendered in the courtroom. He also is known as Israel Regenstreif.

Still being sought by the FBI are:

1—Gus Hall, named by the Grand Jury as Arno Gust Halberg, chairman of the Ohio district of the party.
2—Gilbert Green, chairman of the Communist Party of Illinois.
3—Robert Thompson, chairman of the Communist Party of New York.
4—Irving Potash, of the CIO Furriers' Union.

All were indicted under the Smith Act, a defense measure passed in June, 1940. Conviction carries a maximum penalty of $10,000 fine and 10 years in prison.

The act prohibits the [illegible] advocating of the overthrow of the United States government by force and violence. It has never before been applied to Communists, although under it the government obtained the conviction of 18 members of the Socialist Workers Party (Trotskyites) in 1943.

The Communists have denied in recent propaganda that they advocate violent revolution, but the U S Supreme Court never has decided the point. The separate indictments, it was said, will force a direct court test.

Three of the 12, Williamson, Stachel and Potash have been arrested previously for deportation.

Party's Governing Board

A third, Dennis, was convicted earlier this year of contempt of Congress for refusing to testify before the House Committee on Un-American Activities. He was sentenced to a year in prison and fined $1000 but is free on a $1[illegible],000 appeal bond.

U S Attorney John F X McGohey said the 12 men comprise the "governing board of the Communist Party in the United States."

He said they "run the party, make the policy, and decide what it will do."

The roundup of the men was the

The Pittsburgh Press

VOLUME 65, No. 23 TWO SECTIONS—34 PAGES PITTSBURGH, PA., WEDNESDAY, JULY 21, 1948

WEATHER—Cloudy, warm and humid with scattered showers and thundershowers today, tonight and Thursday.

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U. S. INDICTS 12 REDS; 4

319 **Quinn Exhibit No. 6**

[Committee Print]

Report of the Subcommittee on Legislation of the Committee on Un-American Activities on Proposed Legislation to Control Subversive Communist Activities in the United States

INVESTIGATION OF UN-AMERICAN ACTIVITIES IN THE UNITED STATES

COMMITTEE ON UN-AMERICAN ACTIVITIES

HOUSE OF REPRESENTATIVES

EIGHTIETH CONRGESS

SECOND SESSION

Public Law 601
(Section 121, Subsection Q (2))
April 10, 1948

UNITED STATES
GOVERNMENT PRINTING OFFICE
74282 WASHINGTON: 1948

320 munist Party has, in fact, enjoyed a privileged status, insofar as prosecution under these laws is concerned.

During the war, while the Soviet Union was an ally, some justification for this failure might have existed, but now, when the Soviet Union and its Communist satellites are waging a cold war against the United States and the other free nations of the world, such failure to proceed under existing laws against Communists in the United States is utterly inexcusable.

The effective prosecution of Communists under existing laws has fallen generally into two categories. First there are cases in which Communists have been cited for contempt by the Committee on Un-American Activities. Although a number of contempt citations have been voted over the past 10 years, a commentary upon the effectiveness

of the Justice Department's prosecution of such cases is that just 1 month ago Leon Josephson was the first Communist who began to serve a jail term as a result of sentence and conviction on a contempt charge. The record of convictions in contempt proceedings has been excellent in recent months.

The Justice Department has also begun to proceed recently against alien Communists who perjured themselves in many cases as to their allegiance to the Communist cause when they entered the United States. It is significant that in some of these cases violations occurred over 15 years ago, yet only now has the Justice Department seen fit to prosecute.

Had the law-enforcement authorities vigorously enforced existing laws against Communists in the United States, the growth of the movement would undoubtedly have been stultified, so that it would not constitute the serious threat to our national security that it does at the present time. Thus apathy to, and coddling of, the Communists in the United States by the Department of Justice is in great measure responsible for the magnitude of the problem with which we are faced today.

The committee therefore recommends that the Justice Department immediately institute vigorous prosecution against Communists in every case where they have been guilty of violating existing laws. The Congress cannot be expected to pass legislation directed at controlling subversive influences if such laws are to become dead letters due to the failure of the Justice Department to prosecute. The committee wishes to point out that the Federal Bureau of Investigation has done an excellent job in investigating the activities of Communists in the United States, but investigation without prosecution is not an answer to the problem.

RECOMMENDATIONS FOR NEW LEGISLATION

The Committee on Un-American Activities held public hearings last year on several bills which had been intro-

duced to curb or outlaw the Communist Party. Commencing on February 5, this year, additional hearings were held by the Subcommittee on Legislation. Perhaps the most outstanding panel of legal talent ever to appear before a congressional committee testified concerning the bills before the subcommittee. The witnesses were in virtual agreement as to the necessity for new legislation. There was, of course, some disagreement as to

321 **Quinn Exhibit No. 7**

[Committee Print]

Report of the Committee on Un-American Activities to the United States House of Representatives, Eighteth Congress

INVESTIGATION OF UN-AMERICAN ACTIVITIES IN THE UNITED STATES

COMMITTEE ON UN-AMERICAN ACTIVITIES
HOUSE OF REPRESENTATIVES

EIGHTIETH CONGRESS
SECOND SESSION

Public Law 601
(Section 121, Subsection Q (2))
December 31, 1948

UNITED STATES
GOVERNMENT PRINTING OFFICE
83400 WASHINGTON : 1949

322 its finances, publications, educational activities, its work among minority groups and organizations.

The vast reference collection of the committee is in constant use by committee members and staff employees. Information is also made available to individual Members of Congress, other congressional committees, and various agencies in the executive branch of the Federal Government. From June 20, 1946, to December 22, 1948, reports

on 25,591 individuals and 1,786 organizations were compiled by staff members at the request of Members of Congress. These written reports cover all information found in files, records, and publications of the committee concerning the individual or organization.

The files of the committee have been open to accredited agents of the executive departments and have been widely used in security checks. In Presidential Executive Order 9835, dated March 21, 1947, which prescribes procedures for administration of the loyalty program for Federal employees, the files of the Committee on Un-American Activities are listed as one of the pertinent sources of information to be checked in determining the loyalty of employees and applicants for employment. They have been widely used for this purpose.

Indexes to public hearings and committee publications contain 48,221 references to individuals and 8,593 references to organizations. These indexes and the committee's card files are consulted daily by authorized personnel from numerous Government agencies in connection with loyalty or security investigations. During the period January 22, 1947, to December 21, 1948, accredited representatives of Government agencies made 5,975 visits to the committee file room to secure information. The length of such visits varied from 20 or 30 minutes to an entire day, during which time files were checked for available information concerning 3 to 200 or more individuals.

Visitors during this period were representatives of the following agencies: Federal Bureau of Investigation, Civil Service Commission, State Department, Treasury Department, United States Coast Guard, United States Secret Service, War Department, United States Air Force, Central Intelligence Agency, Navy Department, Labor Department, Federal Communications Commission, Securities and Exchange Commission, Commerce Department, Agriculture Department, Economic Cooperation Administration, National Labor Relations Board, Federal Power Commission,

Civil Aeronautics Board, War Assets Administration, and Metropolitan Police Department.

Material relating to individuals and organizations has been so carefully indexed that Government agents may make their own checks of committee publications and card files. Numerous questions arise as to the source of information found, however, and staff members are constantly available to furnish reference material and answer inquiries. On an average, each person who consults the files makes two requests for assistance.

Government investigators have made constant use of the consolidated card records, a collection of 300,000 card references to activities and affiliations of individuals. Eight cabinets are devoted to these references which are an index to source material in committee files.

In addition to the consolidated card records, which contain references to thousands of individuals, files are maintained on the activities of some 3,040 persons. Five cabinets are devoted to information concerning these individuals, many of whom are top leaders in subversive groups or prominent fellow travelers of the Communist Party. These collections are a valuable guide to the activities of various subversive groups as well as individuals.

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The committee has compiled lists of signers of Communist Party election petitions for various years in 20 States, showing 363,119 signatures. These lists have been obtained from original petitions or photostatic copies of original petitions. The committee has published printed lists of signers of election petitions of the Communist Party for 1940 in the following States: Arizona, California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin.

The committee has also indexed the following Communist Party election petitions: California, 1932, 1934, 1936, and

1938; 1942 petitions in Colorado and New York; 1946 petitions in Colorado, Connecticut, Michigan, and Pennsylvania; New York City, 1936, 1939, 1940, and 1945; Philadelphia, 1941 and 1946.

Of the 363,119 signatures, some 335,660 have been indexed and printed by the committee. The remaining signatures have been indexed and filed in the consolidated card record file. This large completely indexed collection has been a helpful guide in the study of Communist activity in these States and serves as a valuable and readily accessible reference collection for investigators from Government agencies.

In 1948, Government agencies made 80 requests for photostatic copies of signatures to Communist Party election petitions, and other exhibit material in committee files, with the number of pages of photostats in such requests ranging from 1 to 36. During the year, 50 requests were also made by various agencies for the use of material in file on a loan basis for photostating.

Since subversive forces try to infiltrate other organizations while working through their own, the committee has acquired a vast store of information concerning thousands of organizations in the United States. Its scope can be illustrated by the fact that files contain information concerning 380 organizations with names beginning with the letter "A."

Organization material in file is composed chiefly of material issued by the organizations themselves: Letterheads, statements of purpose and policy, reports on proceedings, press releases and literature, announcements of activities, news clippings—material from which the nature of the organization may be determined.

During the past 10 years, the committee has acquired 5,000 pamphlets. Most of these have been written by leaders prominent in subversive movements or issued by subversive organizations. This huge collection contains numerous Fascist and Nazi pamphlets and hundreds of publications of the Communist Party. The collection ranges from subtle to

open propaganda, through story, song, and verse, and reflects the constant effort of subversive groups to incite hatred, capitalize on prejudice, enmesh the unsuspecting, and divide the American people on national and international issues.

Some 8,553 issues of 644 periodicals serve as valuable sources of information. These periodicals reveal the motives and policies of hundreds of subversive groups and the activities of their leaders. The

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324 Filed Jan 12 1951

Motion to Strike Certain Documents Filed in Support of Motion to Dismiss.

The United States moves to strike the following documents filed herein in support of the motion of the defendant for dismissal of the indictment and for other appropriate relief:

Affidavit of Albert J. Fitzgerald
Affidavit of Thomas Quinn
All Quinn Exhibits (1-7 inclusive)

The ground for this motion to strike is that the material referred to is not appropriate to be considered in connection with pre-trial motions; is not part of the record; and is not subject to judicial notice.

GEORGE MORRIS FAY
United States Attorney

CHARLES B. MURRAY
Assistant United States Attorney

* * * * * * * * * * *

326 Filed Jan 19 1951

Order.

Upon consideration of the Government's motion to strike the affidavit of Albert J. Fitzgerald, the affidavit of Thomas

Quinn, and Exhibits Nos. One to Seven, inclusive, and upon argument of counsel, it is by the Court, this 19th day of January, 1951,

ORDERED that the above-named affidavits and exhibits be and the same are hereby stricken, for the reasons that said affidavits and exhibits have no probative value or evidentiary force, are immaterial to a consideration of the motions before the Court, and are not in due and proper form. The Court will not go beyond the allegations of the indictment and the pending motions to consider evidence which should be properly raised at the trial of the general issue; therefore, the motion to strike is hereby granted. Objections thereto are noted on behalf of the defendant.

JAMES R. KIRKLAND
Judge

* * * * * * * * * *

327 Filed January 19, 1951

Supplemental Affidavit in Support of Motion to Dismiss Indictment on the Ground that the Grand Jury was Illegally Constituted

[Supplemental Affidavit stricken for the reason that it is legally insufficient. Objection noted. James R. Kirkland, Judge. January 19, 1951.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

DAVID SCRIBNER, being duly sworn, deposes and says:

I am one of the attorneys for the defendant herein.

This supplemental affidavit is in further support of the motion to dismiss the indictment, on the ground that the Grand Jury which voted the indictment was illegally constituted as to this defendant.

Since the date of my affidavit of December 16, 1950, heretofore submitted in support of this motion, I have ascertained and assert, upon information and belief, that in addition to the ten government employees who were mem-

bers of the Grand Jury which voted the indictment herein, referred to in my former affidavit, there were two Grand Jury members whose husbands were federal government employees at the time the said Grand Jury considered and acted upon the indictment of this defendant.

The defendant respectfully requests that the indictment should be dismissed herein for the reasons given in my former affidavit in respect to the government employment of grand jurors, as supplemented by the information herein with respect to two additional members of the Grand Jury, and with respect to the miasma of fear as it affects government employees. The following individuals were members of the Grand Jury which indicted the defendant herein, and who were employed by the federal government: Laura M. Boyd, Robert G. Dorrity, William H. Floyd, Harry Lee Gray, Charles A. Lickner, Ralph A. Montgomery, Thelma G. Nelson, Raymond D. O'Brien, James P. Perry, James J. Worthington. Mrs. Ida Mary
328 Waldron, wife of a federal employee, and Mrs. Inez Bryant, wife of a federal employee, were also members of this Grand Jury.

In the alternative, defendant requests that the Court direct that a hearing be held pursuant to Rule 12(b)(4) of the Federal Rules of Criminal Procedure, so that defendant may prove that more than 11 of the grand jurors were biased and prejudiced against the defendant.

Government employees for the past few years have been the subject of an active campaign to determine whether they are in any way sympathetic or tolerant to "Communism" or "Communists," or sympathetic to any person who in turn is associated with "Communism" or "Communists" or with organizations which have been called "Communist Fronts" or with persons who may have been called "Communist fellow travelers."

This has developed a miasma of fear among government employees in the District of Columbia. Congressional leaders and congressional committees and the heads of the various federal executive agencies have called for or en-

gaged in efforts to "purge" from government employ persons found to be so stigmatized. As a class federal government employees cannot exercise the degree of impartiality required by the Constitution and the statutes in the carrying out of their functions as grand jurors in a case such as the one at bar, where the defendant is charged with an offense related to the investigation of "Communist" influence.

The issue involved in the investigation by the House Un-American Activities Committee which led to the contempt charge herein, related, according to the Committee itself, to the "infiltration" of Communists in labor unions and particularly in the union of which the defendant is a member or officer. This is the very Committee which has given much time and consideration to the investigation of alleged Communist influence among federal government employees and has announced time and again that the Committee files have been used by the investigative agencies of the federal government to determine the loyalty of federal government employees. (Report of the Committee on Un-American Activities to the U. S. House of Representatives, 80th Cong. 2nd Sess., Investigation of Un-American Activities in the U. S., p. 22, attached to the affidavits of Quinn, Panzino and Fitzpatrick, respectively, as Exhibit 7.)

329 Federal government employees reasonably come to the conclusion that it would endanger their job tenure with the government if they in any way acted in a manner which could be considered to be a sympathetic attitude toward or treatment of a person accused of an offense arising out of an investigation of Communist activities. That would certainly be true of federal government employees who are members of a grand jury where their employer, the United States Government, is the prosecutor, and where the offense is related to the investigation of Communist activities.

That a citizen in the impartial execution of his civic duties may have a cloud of suspicion as to his loyalty arise

is demonstrated most vividly by the reaction against the presiding Justice in the first Hiss trial. Following the conclusion of that case in which the jury could arrive at no conclusion, members of Congress introduced a resolution demanding the investigation of Justice Kaufman, impugning his loyalty solely because he attempted to exercise the functions of his office to the best of his ability. Furthermore, one of the jurors who had refused to vote for conviction against Alger Hiss was required to appeal to the law enforcement agencies for protection from those individuals who were harassing him because of that vote.

Only recently, when the Circuit Court of Appeals for the 9th Circuit granted bail to Harry Bridges, who was accused of perjuring himself with reference to Communist affiliation, U. S. Senator Langer on the floor of Congress demanded an investigation of those respected jurists. It is in this atmosphere that a juror must attempt to arrive at an impartial and independent judgment of the facts. Difficult as it is for any citizen, it is well-nigh impossible for federal employees.

For a number of years, federal employees have been subjected to loyalty oaths and tests and investigations of any possible sympathetic association with Communists, or beliefs allegedly of a Communistic nature. However, with the adoption of the President's Loyalty Order of 1947, Executive Order 9835, federal government employees were subjected to the most intensive and searching investigation of their political beliefs and associations for the purpose of ferreting out and discharging those who were found, in the words of the President's Loyalty Order (Point V, Section 2), to have

330 "F) Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association with any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General as totalitarian, communistic, fascist or subversive, or as having adopted a policy of advocating or approving

> the commission of acts of force or violence to deny other persons from rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

In addition, the Attorney General was authorized to establish lists of organizations characterized by him as being "Communist," "totalitarian," "subversive," etc. Membership in or association with any such organizations was to be given serious consideration to ascertain whether a federal employee was loyal to the government or whether he should be dismissed from its employment. The Federal Bureau of Investigation was given the responsibility of investigating the loyalty of federal employees.

The very adoption of the Loyalty Order and the appointment of a Loyalty Board created a hysteria among government employees which in turn was reflected by and encouraged in the Washington public press and radio. Prominent citizens and leaders of the community throughout the nation attacked the Loyalty Order because of its lack of specifications or limitations. It was pointed out time and again that the Loyalty Order and what it implied would not only create an unhealthy terror in the minds of persons already employed by the government, but would prevent many loyal Americans from entering the government service under the ugly conditions implicit in the Loyalty Order and its proposed operations and functioning.

On the other hand, many others in the public eye, including a substantial part of the press, freely voiced their opinions for public consumption that employees of the federal government should in fact be subjected to the most rigorous and unlimited kind of investigation and interrogation as to their state of mind in respect to their political beliefs, opinion and associations, no matter how far removed, and that if there was any question whatsoever or any doubt about what they considered to be "loyalty," the culprits should be summarily dismissed from their employment and in fact blacklisted.

Attached hereto as exhibits are typical comments as reflected in the press on the Loyalty Order. From the very day that the Loyalty Order was considered, the public press daily, and particularly in the District of Columbia, featured any news relating to the so-called "Loyalty Program" as it affected government employees and highlighted the evils or the benefits of such a program. What
331 is significant is that these very conflicting points of view in and of themselves engendered further fears and an apprehension among government employees in respect to the retention of their jobs as a means of livelihood (Exhibits 1, 2, 3, 4, 5, 6, 7 and 8).

The Report of the President's Committee on Civil Rights, 1947, page 51 states:

> "An employee whose loyalty is questioned is not charged with a crime. But loss of job and inability to obtain another one is a severe punishment to impose on any man. Accordingly provision should be made for such traditional procedural safeguards as the right to a bill of particular accusations, the right to subpoena witnesses and documents . . . where genuine security considerations permit . . . the federal government must maintain a loyalty program which adequately protects the civil rights of its employees."

On page 101, referring to the Loyalty Program, the Report states:

> "The freedom of opinion and expression enjoyed by these people is in many ways dependent upon the attitudes and practices of the government."

Government employees recognized, as indeed they might, that as Circuit Judge Edgerton stated in his dissent in the *Bailey* v. *Richardson* case, 187 F. 2d 46, App. D.C.

> "Ostracism inevitably followed a dismissal . . . a disloyalty finding is closely akin to a finding of treason; the public hardly distinguishes between the two."

The actual functioning of the Loyalty Review Boards hardly dispelled the fears that were reasonably entertained by federal government employees.

At the very time that the Grand Jury in the instant case was considering whether to return indictments against this defendant, and almost a month before the indictments were actually returned, the U. S. Civil Service Commission reported publicly that 280 government employees had already been dismissed as security risks under the Federal Loyalty Program; that 13,202 employees had been the subject of full and complete investigation by the Federal Bureau of Investigation and other agencies; that 1,593 federal employees had resigned while under FBI investigation, and 1,171 federal employees had left their government jobs before the Loyalty Boards had completed their hearings.

This information could certainly not have been any comfort to the 10 government employees who were members of the Grand Jury which returned the indictment against this defendant or for the 2 housewives on the federal Grand Jury whose husbands were government employees. Out of the 23 members of the Grand Jury, 12, a majority, had reasonable grounds to fear that if they did not act in accord with the wishes of their government, personified by the federal prosecutor who presented the case for the
332 government, they would become numbers in a list of those investigated or discharged by the federal government for "sympathetic association" with Communists or those accused of Communist beliefs or engaging in Communist activities and would thereby lose any source of livelihood for themselves and their families.

It became apparent that the only way that a government employee could possibly hope to safeguard his livelihood and the security of himself and his family was to express a hostility to any person, idea, or activity which could in any way possibly be construed to be of a "Communist" character. As a matter of fact, this was apparently made a requirement by those who were carrying on the so-called Loyalty Program. The hearings conducted by the

Loyalty Review Board, which became the subject of common gossip and conversation among government employees in the District, corroborated this as a requirement. The most searching questions into the minds and the attitudes of government employees who were the subject of the investigation, or government employees who appeared as witnesses in these hearings, were a common routine at these hearings. For instance, a Chairman of a Loyalty Board made the following formal statement in respect to his understanding, as one charged with enforcing the Loyalty Program, of what loyalty meant. He said,

> "Loyalty to the United States is an instinctive matter. It is a matter of the mind and of the heart. I believe the way that one speaks an opinion on matters of strengthening the permanency of this government and protection of it are instinctive. It seems to me one ought to know right off at once how he feels about matters affecting the continuance and preservation of our form of government, and that no one, it strikes me, individually ought to require time to make up his mind as to how he feels on a question like that."

Federal government employees had the privilege of reading in the daily press not only of the possible attacks on their loyalty through Loyalty Review Boards, but the constant and repeated investigations of the House Un-American Activities Committee and other committees of Congress into the loyalty of government empolyees. (Hearings regarding Communism in the District of Columbia, Part I, Hearings before the Un-American Activities Committee, House of Representatives, 81st Con., 1st Sess., June 28, 29, July 6, 12 and 28, 1949; Hearings regarding Communism in the United States Government, Part I, Hearings before the Un-American Activities Committee, House of Representatives, 81st Cong., 2nd Sess., April 21, 25, 29, May 4, 5, and 6, 1950; July 30 and Aug. 7, 1948; June 8, 1950; Export Policy and Disloyalty, Hearings before the Investigation Subcommittee of the Committee on
333 Expenditures in the Executive Department, U. S.

Senate, 80th Cong., 2nd Sess., July 30, 1948; Hearings before the Committee on Un-American Activities, House of Representatives, 80th Cong., 2nd Sess., Hearings Regarding Communist Espionage in the U. S. Goverament, Part II, December 7, 8, 9, 10, 14, 1948.)

Certain members of Congress repeatedly accused,—and with a great deal of attendant local and national publicity, —administration officials from the President of the United States down to the lowliest supervising officer of a government department of harboring government employees whose loyalty was in serious question. This attack brought with it the answer by officials of government that the accusations were not warranted and that in fact the government was constantly investigating its employees and weeding out those whose loyalty was in question.

Nor was it much of a comfort to federal government employees to learn that the FBI was engaged in the greatest manhunt among federal civil servants that this country has ever experienced. (Department of Justice Appropriations for 1951, Hearings before the Subcommittee on Appropriations, House of Representatives, 81st Cong., 2nd Sess., pp. 225, 226.)

The director of the FBI himself has affirmed the fact that whenever a federal employee is accused of "Communist affiliation," whether or not such accusations are based in fact, a full-scale investigation is instituted by the Bureau. Malicious accusations, gossip and rumor mongering, therefore, afford a basis for FBI investigation of a government worker. The awareness of such a fact is sufficient to cause a government worker to act in such a fashion that active hostility and lack of tolerance as to those accused of Communism is an evident characteristic of his demeanor, attitudes and actions. (*New York Herald-Tribune*, November 16, 1947, at p. 3.)

The records and public statements of the FBI indicate that it has a fingerprint collection estimated to be in the neighborhood of 112,000,000 individuals; that the FBI has access to records of local police forces; has access to mili-

tary records, employment rolls in large industrial plants; it exchanges information with industry and industrial associations; the FBI obtains data on the subversiveness of individuals from banks, business houses and railroads, that the FBI keeps dossiers and adds names to its files on the basis of information it receives regardless of the sources; that it utilizes the records and files of the House Un-American Activities Committee.

334 It might be noted that the vast majority of federal workers who are employed in Washington, D. C. reside in the District of Columbia. These employees do not have the right to cast a ballot to elect their representatives in Congress or the President of the United States. The normal channels open to the average American citizen who wishes to express his disapproval of the policies and actions of his government, are not afforded these federal employees. Their community life as well as their employment is controlled and supervised by individuals and agencies against whom they have no recourse.

Under these circumstances a juror who is employed by the government may not render an impartial opinion, particularly in a criminal proceeding such as this. A federal employee serving on a grand jury who failed to indict at the request of the government the defendant herein would have reasonable grounds for fearing that such refusal would be considered evidence in determining whether or not he was loyal to the United States government.

The FBI has investigated and checked every federal grand juror who is a government employee, and that person's employment is conditioned by a favorable report from that agency which is a subdivision of the prosecutor's office, the United States Attorney General's office. Information concerning "loyalty" of federal employees who are grand jurors is available to the Attorney General's office prior to the time that grand juror is sworn in. And that grand juror remains under the surveillance of the FBI during his period of employment by the government.

Undoubtedly these investigatory activities of the government, the standards used in determining an individual's loyalty by the Loyalty Review Board, the clear policy of the federal government that it is at war with Communism at home and abroad, the demand of the federal government that all participate in this anti-Communist crusade has a two-fold influence upon the grand juror employed by the federal government. He faces an intensive barrage of anti-Communism which inevitably has the effect of promoting hostility against any individuals said to be associated with Communist activities. This has the effect of predisposing such a juror against any defendant who has been so characterized, even though that juror is not aware of any conscious bias against the defendant. Secondly, he
335 must consciously demonstrate an anti-Communist bias whenever confronted with an issue posed as related to Communism. Regardless of his personal predilections in the particular instance, he has reasonable grounds for believing that a vote of acquittal or no indictment could well serve as a basis for further investigation of his loyalty or as evidence to be used in proof of his alleged disloyalty.

It is respectfully submitted that the above demonstrates that bias, conclusively presumed as a matter of law, must be attributed to the 12 of the 23 grand jurors who returned the indictment against this defendant and who are themselves government employees or whose spouses are government employees.

The motion to dismiss the indictment on the ground that the grand jury was illegally constituted should be granted, or in the alternative a hearing should be granted the defendant to prove by evidence that the said grand jury was illegally constituted.

DAVID SCRIBNER.

Sworn to before me this 17th day of January, 1951,

DAVID RATNER.

David Ratner, Notary Public, State of New York, No. 41-3211650, Qualified in Queens County, Certs. filed with N. Y., Kings, Bronx and Westchester Co. Clks., Queens, King, N. Y. & Bronx Co. Registers, Commission Expires March 30, 1951.

CERTIFICATE

We hereby certify that we have this 17th day of January, 1951, sent a copy of the foregoing affidavit, by official United States mail, to the United States Attorney and Assistant United States Attorney, addressed as follows:

1. George Morris Fay, United States Attorney,

2. Charles B. Murray, Assistant United States Attorney, Office of the United States Attorney, District of Columbia, Washington 1, D. C.

DAVID SCRIBNER and ALLAN R. ROSENBERG,
Attorneys for Defendant.

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336 **Scribner Exhibit No. 1**

Inside Waskington:

WHY GOVERNMENT EMPLOYES' MORALE IS LOW

(Copyright, 1947, by The Chicago Sun and
The Newspaper PM, Inc.)

Washington.—Morale among many Government workers is at a low ebb. Chief reason is the continued "loyalty" purge which struck again in the super-secret central intelligence group, where 14 were fired for "security" reasons.

Workers complain they don't know where the ax will fall next, or when they will be called to account for liberal or new deal views. They don't put much stock in reassurances from department heads that their civil rights will be pro-

tected. The State Dept. purge has disillusioned them on this score.

The Civil Service Commission is aware of the unrest and the other day in a little-noticed speech in Pittsburgh the Commission president, Harry B. Mitchell, tried to put their fears to rest. Mitchell said that so far as 99 per cent of Government workers are concerned, the loyalty purge is ended.

According to the Civil Service Commissioner the purge was over for the vast majority when their fingerprints and loyalty questionnaire were filed.

"I may be too conservative," Mitchell said, "but my opinion is that not more than a fraction of 1 per cent of the employes will have to be further investigated, and that the persons already known to be disloyal are only a small fraction of the above fraction."

He warned against any action by department heads which would make non-Communist workers with left-wing beliefs the "innocent victims" of the current purge and he added:

"Let us keep in mind that the radicalism of today may become the progressivism of tomorrow and the conservatism of after years."

337 **Scribner Exhibit No. 2**

N. Y. Herald Tribune, November 9, 1947

FEDERAL LOYALTY CHECK IS NO. 1 TOPIC IN CAPITAL

Some Government Employees Are 'Bitter, Upset and Scared,' Others See No Peril to Innocent; Press Criticizes Marshall and Truman

By Bert Andrews

Washington, Nov. 8.—In this city of Washington, where 195,000 of the 2,000,000 civilian employees of the executive branch of the Federal government work and play and talk—talk, that is, when they're not too frightened to open their

mouths—the burning topic of conversation this week has been the whole problem of security and loyalty.

Always the conversation gets around to one basic question. It can be put this way:

"Is there anything to be alarmed about, as far as the 195,000 employees here and the 2,000,000 altogether and the whole population of the nation are concerned, in the fact that certain State Department employees have been dismissed without ever having been informed of the charges against them?"

There are four schools of thought.

One school, exemplified by some of the top men in the State Department, insists there is no danger that such summary procedure will ever affect the completely innocent.

A second, exemplified by many of the lesser people in the department, is that a witch hunt is on and that it behooves them to keep quiet least State Department investigators' ears be listening. (One man who left government service after years of work in two departments told this reporter: "I have talked to at least twenty State Department people in the past few days. They are bitter, upset and scared." This reporter and others in the Washington bureau of the New York Herald Tribune have talked to many more people in the department. All agree with the words "bitter, upset and scared.")

A third is that "so, what?" school—a very small one—which argues that it doesn't make much difference to the mass if a few innocent individuals get hurt, and that suspicion is as good grounds for dismissal as is proof.

The fourth school is perhaps best represented by editorial writers in three Washington newspapers who are demanding, with increasing firmness, that suspicion is not enough and, in the demanding, are strongly criticizing either President Truman or Secretary of State George C. Marshall or both.

Representative opinions from all four schools will be presented here in the form of excerpts from statements, letters or editorials.

A large part of the comment resulted from the publication in last Sunday's New York Herald Tribune of the case history of the investigation and dismissal of a State Department employee who can be described merely as Mr. Blank.

A large part of the comment will be news to President Truman and Secretary Marshall.

Samples of Thinking

Here are samples of the thinking of the schools represented:

School No. 1 (The "no danger" school.)—Secretary Marshall represented this. He acknowledged that eleven employees dismissed had no "true hearing." He said they could not be given the charges because the charges were based on "highly classified material" not under the department's control. He left it doubtful that they could even learn the charges, even on appeal to the new loyalty review boards or the Civil Service Commission.

School No. 2 (The "we're scared" school.—Two letters typical of many received as a result of the Mr. Blank article show some of the mental turmoil.

First letter: "There's a lot more hidden, judging by what I observed in the last year—my last with the government. I saw but few of the 'loyalty investigation' files, but I saw the effects. In agencies covering the country, the subordinate officials who always did the best jobs were the ones terrorized. Terrorized by sudden questioning, to them inexplicable, by two suddenly appearing agents demanding to know: 'Who was with you at that meeting at ——— Street on the afternoon of Aug. 19, 1942? We know you were there. We took your car number.' The victim later drove to that address, which he had never heard of before, and tried to ascertain who lived there. Later I read the long dossier. Since the agency cleared the man, the only inference is that a lot of fabrication went into that case. There has been so much of it that I began to wonder what

newspaper men might begin to lift the lid. As you know, fifty years ago France was torn by a social conflict between the powers of government, including generals, and the rights of the governed. The implement then was hysterical anti-Semitism, just as it is now hysterical anti-Communism, and, as now, heightened by the fear of "Military machinations of a foreign power.'"

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338 **Scribner Exhibit No. 3**

The Washington Post

Sunday, August 22, 1948

Matter of Fact

WE DON'T WANT 'LOYAL' NUMSKULLS

By Joseph and Stewart Alsop

There is not the slightest doubt that in these times the American Government must have the right to protect itself from attacks from within. Recent reports in this space on the loyalty case of "Mrs. Ann Smith" illustrate how stupidly this right can be abused. Yet the immensely delicate and difficult problem of national security exists, and it must somehow be solved.

No sensible man believes that J. Parnell Thomas' headline hunts can solve it. And anyone who believes that the solution is to be found in the present loyalty program should consider certain questions which the conduct of the loyalty program has posed.

First, there is the whole troubling question of guilt by association. Obviously, a man who has constantly associated with Communists and promoted Communist fronts should not have access to state secrets. But how far should this principle be carried?

The Banker's Blot

Take the recent case of a State Department employe. He was charged with having associated with 10 persons, all

presumably suspect. He had never heard of five of them, and had had only the most casual contacts with four. But he had known one of the 10 intimately for several years.

This man was a banker, and stood high in the banking community, a community not conspicuous for its radical tendencies. The State Department man could only defend himself by defending the banker, and neither he nor the banker had any notion why the banker was suspect.

It finally developed that the banker had lived briefly in Albuquerque, N. Mex., several years before, and that an anonymous landlady had reported to the FBI that he kept Communist literature in the basement. On further inquiry, it was established that the Communist literature consisted of accumulated copies of the New Republic which the banker had discarded.

This sort of thing is making the loyalty program a pretty sour joke. Moreover, the case of the State Department man is typical in that in the great majority of cases of guilt by association, at least half the supposed associates are wholly unknown to the accused.

Second, it seems obvious enough that an intellectual pro-Communist, who accepts unhesitatingly the Communist dogma, should hold no sensitive position—this was the sort of individual who figured conspicuously in the Canadian spy case. But again, how far should this principle be carried?

Here are a few verbatim quotes from recent loyalty hearings: "What type of books did your associates have—any political or social economy?" "What kind of books, by title, did you purchase, what kind of literature?" "How many copies of Howard Fast's novels have you read?" "Do you read the newspaper PM?" "Have you a book by John Reed?"

Restricted to Dolts

All government employees know that such questions are asked in loyalty cases, and the assumption that any kind of intellectual or political curiosity provides grounds for suspicion is inevitable. If this country wants a Government

service in which ignorance is at a premium, it will doubtless get what it deserves.

Third, does it really matter in America whether a man's maternal grandparents came over from Poland, or whether all his ancestors landed decorously on Plymouth Rock? There have been countless instances when, during loyalty hearings, individuals have been asked where their parents and grandparents were born. An entirely American response would be that it was none of the loyalty board's damn business where a man's forebears came from.

Finally, there is the question of confrontation. Take the case of a man who has one item of "derogatory information" in his dossier. His file notes that FBI source X-32 has said that the accused is known to have attended a meeting of high Communist leaders in Seattle. The accused man hotly denies it. The loyalty board has no way whatsoever of knowing whether X-32 or the accused man is lying, and the board knows nothing at all about X-32.

It is the FBI position that to allow those charged to confront their accusers might compromise FBI sources. This seems logical enough. It is also the FBI position that FBI agents should not be allowed to make estimates of the trustworthiness of their sources, and this, too, seems logical. Yet surely loyalty boards which must decide cases certain to affect the whole future of Government employes should know the identity of the sources of their information. They should also, in case of necessity, be able to confront and cross-question such sources in secret.

Obviously, there is no easy solution to the problem of national security. But a government of drones and boneheads and toadies hardly contributes to national security. And if the sort of thing outlined above is allowed to continue indefinitely, that is the kind of government we shall get.

339 **Scribner Exhibit No. 4**

The New York Times
August 18, 1949

SCIENTISTS SCORE ORDER ON LOYALTY

Association Attacks Concept of Imputing to an Employe Beliefs of Associates

Washington, Aug. 18, 1949 (AP)—The American Association for the Advancement of Science, the world's largest general organization of scientists, today assailed President Truman's loyalty order affecting Federal employes as "basically objectionable."

The organization also strongly criticized the "security clearance" programs of the National Military Establishment and the Atomic Energy Commission as they affect scientists.

In a report published in the association's weekly journal, "Science," the group noted that Mr. Truman's loyalty order provides that no person shall be employed in a Federal post "if he is believed to be disloyal" to the United States Government.

"No one doubts the importance of faithful discharge of duty by public officials," the report said. "No one questions the propriety of the Government's demanding that its employes be loyal to their jobs and to the democratic institutions they serve.

"The loyalty order is, however, basically objectionable because it seeks to determine the employe's loyalty by inquiring into his supposed thoughts and attitudes, which are established in large part by imputing to him the beliefs of his associates.

Major Changes Sought

"If the loyalty order is to be retained a drastic revision is essential. Instead of focusing on an employe's associations, it should focus on his behavior in overt acts. Legislation already on the statute books amply protects the Fed-

eral service against retention of employes who advocate overthrow of the Government."

The association said the Military Establishment's program allowed appeal only to military "tribunal" when a civilian scientist's clearance is disapproved, and it added:

"Such subjection of the destinies of civilians to military tribunals is contrary to national tradition."

Of the AEC's program, the association declared that "work in that field [atomic energy] will be shunned by men of ability and pride if they are constantly treated as objects of suspicion and possible calumny."

The statements were contained in a report drafted by the association's "special committee on civil liberties of scientists." Howard Meyerhoft, secretary of the association, said the report had been ratified by the governing council of the organization, which represents 24,000 members in 211 affiliated scientific organizations.

Exaggeration Is Charged

The report said the Atomic Commission "has recently manifested a tendency to require security clearance not only for those scientists who themselves have access to restricted data, but also for their fellow-scientists with whom they may have personal contact."

"This apparently reflects a yielding to uninformed or sensationalist legislators and others who tend to exaggerate the problem of "keeping our atomic secrets," the report said. "So far as disclosures of evidence reveal, the problem of faithless scientific personnel in this country appears to be markedly less grave than the public has been led to suppose."

In another phase of its report, the committee asserted that "secrecy is damaging to both science and democracy," and added that it endorsed the 1947 report of President Truman's scientific research board which said in part:

"* * * Security regulations * * * should be applied only when strictly necessary and then limited to specific instruments, machines or processes. They should not attempt to cover basic principles of fundamental knowledge."

340 **Scribner Exhibit No. 5**

Washington Post: Tuesday, April 1, 1947

THE FEDERAL DIARY

By Jerry Kluttz

Loyalty Order Used As Blackjack for Jobs

LOYALTY? An attempt is being made by the unprincipled and the unscrupulous to use the President's loyalty order as a blackjack to get and keep Federal jobs. This is the sort of thing that's happening:

INCIDENT 1: A job was open in Commerce. The division chief talked with an applicant who wanted to transfer from a dying agency. The applicant appeared qualified and the official told him to return in a few days. Meantime, the chief checked the employer of the applicant, and he got this answer:

"I couldn't possibly recommend that person; he has broken every rule in the books, and if this agency wasn't going to fold up soon I would be compelled to fire him."

When the applicant returned to Commerce, he was told by the division chief that no job was available as it had been decided to abolish the vacant position. The crestfallen applicant went away. But it wasn't long before he returned to the outer office to cry out to several staff members—words he knew would get to the chief promptly:

"Your boss lied to me; he said he didn't have a job open here, and I know he does have. Now I'm going to tell you something—your boss is a Communist, and it's like every Communist to lie, lie, and lie. Unless I get a call damn soon from your boss to tell me that the job here is mine, I'm going to report him to both the House Committee on Un-American Activities and the American Legion and he'll be investigated out of his job."

Many a chief would have weakened under the circumstances. But to his everlasting credit, the Commerce official stood by his guns. He was reported, however, as both a Communist and anti-veteran by the applicant. The official

a veteran himself, happened to be acquainted with people in both groups who knew the charges were screwy—but a lot of other loyal and able officials aren't so fortunate.

INCIDENT TWO took place at the State Department. The person involved was given a 90-day temporary assignment which he tried to get converted into a permanent job. As the 90 days neared an end, the employe was told his job was done, and besides, the department didn't have the money to keep him. But the employe wouldn't take no for an answer, and he launched this counterattack:

"I don't like the tone of the reports that are being written in this office," he began, "they are obviously slanted in favor of Russia, and they are written by people who are sympathetic with the Reds. I've been debating," he said, "whether to take this condition to some of my friends in Congress."

Being something of a diplomat, the temporary employe dropped the hint that he could see the reports as fair and objective if his temporary assignment was made permanent.

P.S.: I don't know the final chapter in this story—other than the threats frightened the entire office which merely boils down reports that come into the department the world over.

INCIDENT 3 covers a score or more of agencies. An organization, generally respected, is using a blackjack to run out Government people it doesn't like. So it's using what it believes is an expedient method by calling these people Communists.

The outfit works like this: One of its representatives calls on the department head to give him a list of employes in his agency which it claims are Communists. The demand is made that either the people be fired immediately, or the organization will get a congressional committee to investigate.

CONCLUSION: All this should be a warning to congressional committees and individual members of Congress

that they will turn over Government to the crackpots if they listen and follow through on every Communist complaint made to them. In each of the incidents cited above, the cooperation of Congress, or even a single member, is all important to carry out their aims—and this cooperation should never be given without supporting facts.

Fully half a dozen congressional committees are investigating some phase of employe loyalty. What satisfies one congressional committee is objected to by another. The agencies are in a spot where they can't win.

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341 **Scribner Exhibit No. 6**

The Washington Star

November, 1949

OUTDATED RIGHT OF PRIVACY

Loyalty Checks Seen Making Business Of Citizen That of Government, Too

By Thomas L. Stokes

The times are out of joint for some of us around here of another generation who were raised in the tradition, and crusaded for it, that American citizens are entitled to privacy of their opinions and beliefs and could think and say what they pleased without being molested or spied upon or subjected to eavesdropping by minions of the law.

But it's a new world, not a brave new world, nor even the more comfortable world before our two global wars and their so-called "ideological" conflicts, but a world of fear and distrust. We'll probably have to get used to it and keep our mouths shut, but we don't have to like it.

These observations, which are philosophically resigned, are provoked by two recent developments here showing the temper of our times.

One is the movement for a permanent Federal loyalty program to pass upon Government employes. It started

over in the Pentagon where our military brass throws its weight around as if the war still were on and now has the approval of Seth Richardson, chairman of the Loyalty Review Board appointed by the President, which has about finished its job of combing through the nearly 3,000,000 Government employes in its search for "disloyalty."

Wire Tapping Approved

The other is Attorney General McGrath's acquiescence, after a review of FBI wire tapping methods and procedures, to continue wire tapping. It is known that the Attorney General, soon after he took office, was inclined to favor ending this practice, though he reserved final opinion until the review which he now has made.

Wire tapping, as now practiced, is presumably restricted and circumscribed. It can only be done after approval of the Attorney General in each specific case and is supposed to be confined to cases of espionage, sabotage and kidnapping under a rule of thumb laid down by former Attorney General Francis Biddle.

It came back into use for war purposes and was approved by the late President Roosevelt. The war is over. But the present Attorney General bases his certification for continuance on "the emergency which still prevails and the necessity of protecting the national security." That obviously means the so-called "cold war" which, of course, may continue for some time. Arnold Toynbee, the famous English historian, figures perhaps half a century.

Evidence obtained by wire tapping is not admissible in courts under a Supreme Court decision which was an issue in the Judith Coplon-Valentin Gubitchev trial in New York where it was revealed that the FBI did lots of wire tapping, including telephone conversations between counsel and client.

FBI Does Investigative Work

Making the loyalty network permanent is involved in a pattern with the FBI and its activities. The FBI does the

investigative work for the loyalty board. *Together they constitute a Federal super-police system which seemingly is to go on in our Government. Some of the things that have leaked out of the loyalty board, the prying into private lives, opinions, political activity and reading habits, indicate the danger of abuses in such a system under permanent status, especially with the inadequate legal protections for any one caught up in it, no matter how innocently.*

There is no way to turn the light on it, as there is no way to find out how carefully the FBI uses the wire tapping technique. Such operations are all secret and newspapers have virtually no way of keeping on them that check which is so essential in a democracy.

The exhaustive inquiry into nearly 3,000,000 Government employes found only a handful of "loyalty" risks or, in other words, the Government service was, according to the FBI, 99.6 per cent pure, which seems pretty good. Why could not the ordinary procedures for checking Government personnel, including that of the Civil Service Commission, serve adequately in peace time, as they did for so many years? The commission has ample powers.

But that is perhaps just an oldfashioned idea that takes too little account of the strange fears abroad in the world today which have had a slowly deteriorating influence on American democracy as we of another generation knew it.

Please forgive us old fogies. We'll try to keep our mouths shut and our powder dry.

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342 **Scribner Exhibit No. 7**

WASHINGTON CALLING

By Marquis Childs

Heresy Hunt

To carry out the European recovery program will call for the very best brains in this country. That is one fact about which no one can possibly disagree.

It calls for economic as well as political specialists. Practical men with business experience will be called upon. There will be need, too, for those with academic and theoretical training, familiar with the trend of the long period.

This is part of the responsibility that has fallen on the United States. It goes along with the greatest accretion of economic, industrial and technological power the world has ever seen. We are only just beginning to realize what that responsibility means.

In the light of that responsibility and the demand it is certain to make on our brains and our skills, we cannot afford the kind of witch-hunting that has created something like a crisis in Government. A way must be found to resolve the suspicion and uncertainty which becloud Government service today.

Good men, men with independent minds, will not come into Government service under such circumstances. The financial sacrifice is, in most cases, too great to expect that the citizen will subject himself to having his conscience and his thoughts combed for possible heresy.

The cases that come immediately to mind are those of the 11 State Department employes dismissed because they were believed to be disloyal or because they were "bad security risks." Even if Congress eventually puts the administration of the European Recovery Program in a new agency, the State Department is certain to need able new recruits.

Yet employes of the department are subject to dismissal without being given an opportunity to know the cause. Bert Andrews of the *New York Herald Tribune* performed an important service in presenting one of these cases in detail, protecting, of course, the identity of the individual involved.

The documents in that case showed how tenuous were the grounds for the man's dismissal. He was shadowed for eight months by the FBI. Yet what they found, insofar as

it was revealed by the questions asked of the individual, was vague and shadowy. Most of the questions dealt with associates whom he had seen at infrequent intervals.

In June of 1945, five men and one woman were taken in an FBI raid. Two of the men were State Department employes and one a naval officer whose loyalty had never hitherto been questioned. They were stripped and treated like common criminals.

The charges against the three proved baseless. A grand jury subsequently cleared them for lack of evidence. The damage of publicity had, of course, seriously harmed them and there was no way in which they could be compensated for this damage.

But at least they were cleared. The public could know that, after due legal process, they were found to be without guilt.

The recent loyalty dismissals were harsher and more cruel, particularly since potential employers are told that the dismissed men were found to be "bad security risks." The State Department permitted three of them to "resign without prejudice," and now has granted the same permission to seven others because, through a technicality, their cases do not come under the jurisdiction of the recently appointed Loyalty Review Board.

The department states that it is taking steps to insure that, in the future, its employes will have the right to appeal to the Loyalty Review Board. However, review by the 20-man board is bound to be slow and cumbersome. Delays will work hardships on individuals and will impede the whole process of Government.

The heresy hunt has already had that effect. Government agencies seeking new employes for specialized jobs find that getting them cleared is an interminable business.

One agency recently sought to employ a young economist. He had a good combat record in World War II, with several citations for bravery under fire. But the report from the Civil Service Commission cast doubt on him because

five years before the war, when he was just out of college, he was "in association" with the "Communist-dominated" American Civil Liberties Union. The American Mission to Greece also has been hampered in assembling a suitable staff by the cumbersome security machinery in the State Department.

The whole thing can be put simply. We will not be able to do the job that is ours in the world today if we do not cure ourselves of the current case of jitters. Those who are exploiting it for political purposes are playing directly into the hands of the Communists who would isolate America. It is long past time to apply plain common sense.

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343 **Scribner Exhibit No. 8**

Washington Post December 30, 1947

FLAXER HITS LOYALTY TEST DIRECTIVES

Abram Flaxer, president of the CIO United Public Workers, last night charged that the rules issued Saturday by the Loyalty Review Board are "mere window dressing" for police state procedures.

"It is obvious," he said in a statement, "that a facade of sham hearings and procedures have been erected to hide the real situation—that a police agency, the Federal Bureau of Investigation—now has sole and exclusive authority to render judgment on the loyalty of Government employes.

"The public had been led to believe the appointment of this board would result in the establishment of procedures guaranteeing Government employes the basic civil rights all Americans have enjoyed under our Constitution . . . The board has done nothing to allay the just suspicions which had previously been expressed . . .

"Of what use are three hearings or appeals if the accused is denied the right to confront the witnesses against him and deprived of the right of cross-examining such witnesses? . . .

"The hearings and appeals boards are in the same position as a jury in a murder trial that has been instructed to find the accused guilty on the basis of nothing more substantial than a secret report from the chief of police saying that he has information as to the guilt of the accused from an anonymous witness whose identity cannot be disclosed. . . ."

The New York Times
December 29, 1947

FORTAS CRITICIZES LOYALTY METHODS

Special to The New York Times

Washington, Dec. 28—Procedures for testing the loyalty of Government employes announced yesterday by the new Loyalty Review Board drew the criticism tonight that they raised "serious problems" in the safeguarding of constitutional liberties.

Abe Fortas, former Under-Secretary of Interior, predicted that under the board's rules the right of an accused employe to be accompanied by his lawyer when appearing before the board would be "largely empty."

Mr. Fortas is one of three attorneys and former high officeholders who represented six State Department employes when they were dismissed for security reasons last summer.

"It is doubtful if a lawyer can be of very much help to a person accused of disloyalty if he is to be denied the right to confront his accusers, or the opportunity to cross-examine witnesses," Mr. Fortas commented. He also charged that the board's decision not to disclose to the accused the sources of its evidence was in violation of the Bill of Rights.

Mr. Fortas attacked particularly the board's rule that accused persons would not be permitted at any time to inspect any report made against him by the Federal Bureau

of Investigation, which will do virtually all the investigative work in the Government's unprecedented loyalty program.

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344 Filed January 26, 1951

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JULIUS EMSPAK .....Criminal No. 1742-50
THOMAS J. FITZPATRICK .....Criminal No. 1743-50
THOMAS QUINN .....Criminal No. 1744-50
JAMES J. MATLES .....Criminal No. 1745-50
PHILIP BART .....Criminal No. 1746-50
FRANK PANZINO .....Criminal No. 1747-50
TALMADGE RALEY .....Criminal No. 1748-50
PASQUALE L. J. BRANCA .....Criminal No. 1749-50
CLARENCE HISKEY .....Criminal No. 1750-50
ESTHER TICE .....Criminal No. 1751-50
FRANK HASHMALL .....Criminal No. 1752-50
LOUISE BERMAN .....Criminal No. 1753-50
STEVE NELSON .....Criminal No. 1796-50
GIOVANNI R. LOMANITZ .....Criminal No. 1797-50
MARCEL SCHERER .....Criminal No. 1799-50
DAVID J. BOHM .....Criminal No. 1824-50

Order and Opinion

The above defendant was one of sixteen indicted by the Grand Jury of this Court for contempt of Congress (2 U. S. Code 192) for failure to answer questions before a duly created sub-committee of the Committee on Un-American Activities of the House of Representatives, pursuant to Section 121 of the Legislative Re-organization Act of 1946, sub-section (q) (2), and House Resolution 5 of the 81st Congress.

345 The defendants have filed motions to dismiss and alternative motions in the several cases for a bill of particulars and to have a hearing to show bias and prejudice on the part of members of the Grand Jury which returned these indictments.

Upon consideration of the argument of counsel, the indictment, and the several motions and memoranda filed herein, it is by the Court, this 26th day of January, 1951.

ADJUDGED, ORDERED and DECREED as follows:

(1) Section 192, Title 2, of the United States Code is constitutional, and does not exceed the bounds of the constitutional power of Congress to investigate in aid of its legislative jurisdiction; nor is it vague and indefinite; nor does it violate the First Amendment to the Constitution of the United States. *Barsky* v. *United States,* (1948) 83 U. S. App. D. C. 127, cert. den. 334 U. S. 843; *United States* v. *Josephson,* (1947) 165 F.(2d) 82, cert. den. 333 U. S. 838, rehear. den. 333 U. S. 858; *Eisler* v. *United States,* (1948) 83 U. S. App. D. C. 315, 170 F.(2d) 273, cert. den. 333 U. S. 838; *Morford* v. *United States,* (1950) 339 U. S. 258, rehear. (1950) —— U. S. App. D. C. ——, 184 F.(2d) 864, cert. den. (Nov. 6, 1950) 71 S. Ct. 130; *Trumbo* v. *United States, Lawson* v. *United States,* (1949) 85 U. S. App. D. C. 167, 176 F.(2d) 49, cert. den. (1950) 339 U. S. 934.

(2) Section 121 of the Legislative Re-Organization Act of 1946, sub-section (q) (2), and House Resolution 5 of the 81st Congress creating the House Committee on Un-American Activities, is constitutional. *Barsky* v. *U. S.; U. S.* v. *Josephson; Eisler* v. *U. S.; Morford* v. *U. S.; Trumbo* v. *U. S.,* and *Lawson* v. *U. S., supra.*

346 (3) The above indictment does charge an offense under the laws of the United States. It is a good example of a "plain, concise and definite written statement of the essential facts constituting the offense charged." (F. R. C. P., Rule 7(c).) It should enable the defendant to understand the nature of the accusation; it

affords adequate notice of the offense with which defendant is charged; it gives defendant the information needed to prepare his defense, and makes it possible for him to plead a judgment in bar of another prosecution for the same offense, and is accordingly legally sufficient. *U. S.* v. *Josephson, supra.*

(4) In the absence of a showing of actual bias on the part of the members of the Grand Jury due to their employment in the Government of the United States or the Government of the District of Columbia, the indictment is not void. *United States* v. *Wood,* (1936) 299 U.S. 123; *Frazier* v. *United States,* (1948) 335 U.S. 497; *Dennis* v. *United States,* (1950) 339 U. S. 162. In a particular case Government employees serving as Grand or Petit Jurors might be barred for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors. No such circumstances are present under the force of the present motion to dismiss, nor were any such circumstances indicated in defendant's proffer of proof in support of the motion for a hearing on the qualifications of the Grand Jurors.

(5) No showing having been made to require the Government to file a bill of particulars, that portion of the motion seeking the same will be denied.

(6) The Court reserves for a further opinion on the force of the motion to dismiss as to whether the indictments charge one or a multiple series of contempts,
347 and also upon the question of whether a witness properly before a committee of Congress who claims his immunity under the provisions of the Fifth Amendment to the Constitution can receive judicial punishment under indictment for contempt of Congress.

It has been suggested that the Court take judicial notice of the proceedings before Congress. However, since the indictment is under attack by a motion to dismiss, the Court will not go outside the record at this time to judicially notice such matters.

All other matters not heretofore expressly ruled upon or reserved for further consideration which have been raised in the several motions to dismiss are accordingly overruled.

JAMES R. KIRKLAND
Judge

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348 Filed January 31, 1951

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JULIUS EMSPAK ..... Criminal No. 1742-50
THOMAS J. FITZPATRICK ..... Criminal No. 1743-50
THOMAS QUINN ..... Criminal No. 1744-50
JAMES J. MATLES ..... Criminal No. 1745-50
PHILIP BART ..... Criminal No. 1746-50
FRANK PANZINO ..... Criminal No. 1747-50
TALMADGE RALEY ..... Criminal No. 1748-50
PASQUALE L. J. BRANCA ..... Criminal No. 1749-50
CLARENCE HISKEY ..... Criminal No. 1750-50
ESTHER TICE ..... Criminal No. 1751-50
FRANK HASHMALL ..... Criminal No. 1752-50
LOUISE BERMAN ..... Criminal No. 1753-50
STEVE NELSON ..... Criminal No. 1796-50
GIOVANNI R. LOMANITZ ..... Criminal No. 1797-50
MARCEL SCHERER ..... Criminal No. 1799-50
DAVID J. BOHM ..... Criminal No. 1824-50
FREDERICK V. FIELD ..... Criminal No. 1785-50
PHILIP J. JAFFE ..... Criminal No. 1786-50
WILLIAM L. PATTERSON ..... Criminal No. 1787-50

Opinion

The first sixteen above-named defendants were indicted by the Grand Jury of this Court for contempt of Congress

(2 U. S. Code 192) for failure to answer questions before a duly created sub-committee of the Committee on Un American Activities of the House of Representatives, pursuant to Section 121 of the Legislative Re-organization Act of 1946, sub-section (q) (2), and House Resolution 5 of the 81st Congress; the last three above-named defendants
349 were indicted by the Grand Jury of this Court for contempt of Congress for failure to answer questions before a duly created sub-committee of the Committee on Foreign Relations of the United States Senate which was conducting hearings pursuant to Senate Resolution 231, 81st Congress, 2nd Session. Title 2, Section 192, of the United States Code provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully makes default*, or who, *having appeared, refuses to answer* any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor * * *." (Emphasis supplied)

Defendants herein have filed motions to dismiss the indictments pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

Each indictment contains several counts ranging up to as high as 68 counts in one case. Counsel for defendants urge that these indictments are duplicitous in that they charge one crime in several counts and also that they put the defendant in jeopardy of being convicted and punished more than once for the same act. The Government counsel argues that since the statute, 2 U. S. C. 192, *supra*, defines the crime as the refusal to answer "any question", then each refusal to answer a different question would be a separate violation.

In *Upshaw* v. *U. S.*, (1946) 157 F. (2d) 716, the Court set out the test for determining the identity of offenses as follows:

"And the generally recognized test for determining whether the offenses charged in two or more indictments or in different counts of the same indictment are identical or separate is whether the same proof would sustain a conviction under both or whether each requires proof of one or more facts which is not required of the others. *Blockburger* v. *U. S.*, 284 U. S. 299; *Gilmore* v. *U. S.*, 124 F. (2d) 537." Ibid, p. 717.

As contended by the United States in this pro-
350 ceeding, if a witness refuses to answer any question he has violated the statute. Clearly it is necessary to prove a different fact to sustain the charge for each different question. Applying the above test to the indictments in these cases, the refusal to answer each question must be charged in a separate count since the same proof would not sustain a conviction under each count, and an indictment charging more than one offense in any one count is as defective as an indictment charging a single offense in multiple counts. In several recent cases involving contempt, indictments setting forth the several questions which the defendants refused to answer were held valid. *Alexander* v. *U. S.*, (1950) 181 F. (2d) 480; *Doran* v. *U. S.*, (1950) 181 F. (2d) 489; *Kasinowitz* v. *U. S.*, (1950) 181 F. (2d) 633; *Trumbo* v. *U. S.*, (1949) 85 U. S. App. D. C. 167.

Counsel for defendants go a step further, however, and urge that a conviction on each count would allow the Court to incarcerate some of these defendants for the balance of their lives. Although the problem of the sentence after conviction is not before the Court at this time, it does appear that a short discussion of this problem as collateral to the allegation of duplicity may be helpful.

Diligent effort on the part of counsel has produced a series of cases which are pertinent here. One of the earliest cases to consider this precise problem was *Maxwell* v. *Rives*, (1876) 11 Nevada 213. In this case the defendant was held in contempt of court for refusing to answer a number of questions. In considering the trial court's action in imposing a separate penalty for each refusal the court said:

"A penal statute must be strictly construed. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial of the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer * * * The dis-
351 trict judge erred in finding that each separate refusal to answer a question was a distinct contempt * * *." Ibid, p. 221.

The Court there cited *People ex rel Tweed* v. *Liscomb,* (1875) 60 N. Y. 559, in which opinion may be found a collection of English and early American cases which involved multiple penalties for a single act.

Recently the United States District Court for the District of Hawaii considered indictments identical in substance to those before the Court now, and that court held in respect to the multiple count indictments as follows:

> "As to objections to the number of counts, the Court is of the opinion that the Government has the right to frame each refusal to answer in a separate count. Rule 8 of the Federal Rules of Criminal Procedure gives that right. However, as the questions appear to be directed all to one subject of inquiry and the answers were simultaneous during the proceedings, and continuous acts, the indictments therefore charge only one alleged offense. *Kerr* v. *Squier,* 151 F. (2d) 308 (Ninth Circuit); *Price* v. *U. S.,* 150 F. (2d) 283-285 (Fifth Circuit); *Upshaw* v. *U. S.,* 157 F. (2d) 716 (Tenth Circuit) strongly indicate that no matter how many refusals to answer may occur in an examination such as is alleged, the maximum sentence that could be imposed pursuant to the statute involved, Section 192, Title 2, U. S. Code, would be punishment for not more than one refusal." *U. S.* v. *Yukio Abe,* Crim. No. 10,335 (Nov. 17, 1950).

Accordingly, the District Court of Hawaii refused to dismiss the indictments on the ground of duplicity, and deferred ruling on the motion to dismiss until after a trial on the general issue.

Two recent State cases, *Fawick Airflex Co.* v. *U.E.R. & M.W.A.,* (1950) 92 N. E.(2d) 436 (Ohio) and *People ex*

rel Amarante v. *McDonnell,* (1950) 100 N. Y. S. (2d) 463, considered a charge of separate contempts for refusal to answer a series of questions. Both courts held that only one contempt was committed and the defendant could receive only the maximum penalty for one contempt after conviction. In the Fawick case, the court rationalized the problem as follows:

> "As heretofore noted in this opinion, the appellant was found guilty of three separate acts of contempt based upon his refusal to answer three separate
> 352 questions.
>
> It appears to the members of this court that the questions were of such character that they should be treated as an inquiry into but one single subject. The first question asked the witness directly was whether he was a member of the Communist Party. When he refused to answer, other questions were then asked, which, if answered in the affirmative, would have established an inference that he was such a member. In fact, the entire inquiry was directed toward the establishment of but one fact. The witness' refusal to answer the three questions under discussion constituted, in the opinion of the members of this court, but a single contempt, for the reason that they all had to do with the same subject matter."

The New York court considered the problem in the same light, saying:

> "The question then presents itself as to whether or not by refusing to answer seven questions relating to the same subject matter the relator was guilty of seven separate and distinct contempts. If this question be answered in the negative, then the County Judge acted in excess of the jurisdiction conferred upon him in sentencing the relator to a term in excess of the maximum provided by law for a criminal contempt.
>
> The court is of the opinion that the relator committed but one contempt. To hold otherwise would enable a prosecutor to ask an unlimited number of questions concerning the same subject matter or even to ask the same question in various forms, with the net result that a witness might be incarcerated for the balance of his life."

The New York statute on contempt is the Judiciary Law Section 750, which reads:

> "A court of record has power to punish for a criminal contempt a person guilty of either of the following acts, and no others:
>
> * * * 5. Contumacious and unlawful refusal to be sworn; or, after being sworn, *to answer any legal* and proper interrogatory." (Emphasis supplied)

Title 2, U. S. Code 192, *supra*, uses the word "any" in the same sense as the New York statute, yet the indictment in the Amarante case was not held defective for duplicity. The court in these two cases obviously directed their concept of the singleness of the offense to the imposition of the penalty.

In *Trumbo* v. *U. S.*, *supra*, the indictment was in
353 two counts consisting of two separate questions which defendant had refused to answer. The court, at page 169, said, referring to two defendants, Lawson and Trumbo: "Both trials resulted in convictions and the imposition of the maximum sentence allowed by 2 U. S. C. 192 of one year and $1,000 fine". The court without discussing the problem obviously approved conviction under the two count indictment and also imposed a sentence of the maximum penalty for a single contempt. That decision is binding upon this Court, and it is also well supported as pointed out by the foregoing discussion.

The counts involved in the several indictments under consideration consist of questions which apparently on their face were directed to one single line of inquiry which was the specific phase of inquiry then being considered by the Committee. As noted previously, each question requires proof of a different fact; therefore, the questions must be set out in different counts. This being so, the indictments are not duplicitous. Proof which would sustain any single count will sustain a conviction for contempt as charged. The question of double jeopardy will arise only if a defendant is sentenced on more than one count. Since only one

contempt is charged in each indictment, the rationale of the decisions discussed above would seem to limit the sentence to a maximum penalty for one contempt. The objection is academic and premature at this stage, however, but may be raised if a sentence for more than one refusal is imposed.

Counsel have also argued that the claim of protection against self-incrimination embodied in the Fifth Amendment entitles a witness before a Congressional committee to an immunity which will support a dismissal of an indictment charging violation of 2 U. S. C. 192 prior to a trial of the general issue. This contention raises a procedural question, the solution to which requires a consideration of the preliminary facts, which must be established as a matter of law to support the granting of such a
354 motion.

The necessity for the right of a legislature to conduct inquiries as an aid to the legislative process is more critical now than at any time in the history of the world. The complexities of our present economy, the attempts of modern statesmen to achieve international unity and the recurrence of the concept of a balance of power throughout the world render any single group of men incompetent to deal with the legislative process without the aid of detailed inquiries into the fields of prospective legislative control. Such responsibility as falls on the members of our legislatures, demands the authority to compel disclosures of pertinent information relative to the requirements of the law making process.

In the formation of the Constitution of the United States, the citizens of the several states were anxious that their individual liberties, so recently gained by the American Revolution and which they had protested to the imperial heads of England, should not be lost in the untried Federal Government which the Constitution established. Accordingly, the first ten amendments were voted at the outset of the ratification of the Constitution, and they apply strictly

to the Federal Government. The Fifth Amendment declares:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled, in any criminal case, to be a witness against himself,* nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation." (Emphasis supplied)

In the early stages of the development of the common law, a defendant in a criminal case was not permitted to testify nor be represented in court by counsel. When one further considers that the grand jurors were persons who had actual knowledge of commission of crimes in their locality and were assembled in advance of the king's justices, then moving in circuits, one can understand the reluctance of the American colonists to permit the Federal Government to compel a defendant in a criminal case to give testimony against himself. It was anciently established that no person should be compelled to give testimony against himself. This came about as orderly progression of the growth of criminal procedure as a part of the common law. However, it appears to be of a more recent origin than the next point to be discussed insofar as the ratification of the Constitution was concerned.

355

Growing up with the development in the criminal law, but ancient by many years, was the proposition that there was an inherent right in Government to subpoena and inquire of citizens concerning activities for which legislation was necessary. This information was then, as it is now, vital to the legislative process. The earliest instances of punishment visited by the House of Commons upon contumacious and prevaricating witnesses summoned before

Parliamentary inquiries related to disputed elections. The earliest recorded instance appears in the year 1586. Later, in 1604, in Sir Francis Godwin's case, where Parliament was inquiring into election irregularities, it was stated: "Power given in that Case to send for an Officer, and to view and search any Record or other thing of that kind, which may help their Knowledge or Memory in this particular Service". On June 4, 1621, Randolph Davenport was imprisoned for misinforming a committee before whom he was called as a witness. There was a Parliamentary investigation in 1688 into the conduct of the war in Ireland. There also appears to have been legislative power as early as 1789 in the American colonies, and it was well entrenched when the Constitution was ratified. Undoubtedly the framers had its ancient origin in mind as it laid the framework of the American Federal Government.

These two streams of social control flowed parallel
356 to each other in their development through the centuries. This development has been the subject of careful study by many scholars, and is thoroughly discussed in Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 Harvard Law Review 153 (1926). It is now well established that Congress has the power to compel pertinent disclosures. *McGrain* v. *Daugherty,* (1927) 273 U. S. 135; also that a Congressional inquiry may be as broad as the legislative purpose requires *Townsend* v. *United States,* (1938) 95 F.(2d) 352; and that a legislative purpose will be presumed in authorizing a Congressional investigation. *In re Chapman,* (1897) 166 U. S. 661. The pertinency of the evidence is not determined by its probative value, and like the question of relevancy in a trial, it is a question of law; but the witness may be punished if he mistakes the law, since the issue of good faith is not involved. *Sinclair* v. *U. S.,* (1929) 279 U. S. 263. The witness of course must be properly before the committee either by reason of service of process or by voluntary appearance. The procedure before the commit-

tee is informal, but precedent has fully established the practice of informing a witness of his rights of immunity at the hearing. A claim of immunity under the Fifth Amendment is personal to the witness. *Brown* v. *Walker,* (1896) 161 U. S. 591.

If there has been any doubt that the Fifth Amendment applies to testimony before Congressional committees, it has been dispelled by many decisions, and in fact, was recognized by Congress itself in 1857 when it enacted an immunity statute, 11 Stat. 155, from which R. S. 859, codified in 18 U. S. C. 3486, stems. It provides:

> "*No testimony* given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, *shall be used as evidence in any criminal proceeding* against him in any court, except in a prosecution for perjury
> 357 committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." (Emphasis supplied)

The avowed purpose of that Act was to "enforce the attendance of witnesses * * * and to compel them to discover testimony". Congress thus sought to compel testimony which might be protected by the Fifth Amendment by granting the immunity of R. S. 859. To this day that section remains virtually as enacted as 18 U. S. C. 3486, untested by Court decision although relegated to a doubtful status by *U. S.* v. *Bryan,* (1950) 339 U. S. 323. In that case the court considered 859 by analogy to R. S. 860, a statute identical in all material respects with R. S. 859, and which was considered in *Counselman* v. *Hitchcock,* (1892) 142 U. S. 547. The court in this latter case held that R. S. 860 was not an adequate substitute for the protection of the Fifth Amendment regarding self-incrimination. In *U. S.* v. *Bryan, supra,* Mr. Chief Justice Vinson, speaking for the majority of the Court, went beyond the issues involved to indicate that R. S. 859 is no more of a substitute than was R. S. 860. The Congress repealed R. S. 860 in 1910.

On the other hand, immunity statutes have been enacted in regard to administrative hearings which do afford an adequate substitute for the Fifth Amendment. In *U. S.* v. *Eisele,* (1943) 52 F. Supp. 105, decided by Judge Pine of this District Court, a prosecution was barred because of testimony given under the immunity of 15 U. S. C. 77v. (c). Similarly, in *Smith* v. *U. S.,* (1949) 337 U. S. 137, a prosecution was barred by the immunity of 49 U. S. C. 46. The two immunity statutes cited above contain the words "no person shall be prosecuted for or on account of any transaction, matter or thing, concerning which he may testify". This remission of responsibility for criminal acts met the absolute test of the constitutional provision against self-incrimination as early as *Brown* v. *Walker, supra,* and as recently as *Smith* v. *U. S., supra.* This type of im-
358 munity statute is clearly broader than the phrase, "no testimony given by a witness" which is used in R. S. 859. There is no doubt that Congress can elicit self-incriminating testimony from a witness provided the witness is offered, in exchange, an immunity from prosecution which is as broad as the Fifth Amendment.

An exhaustive review of cases which require the immunity statute to be as broad as the protection of the Fifth Amendment is contained in 118 A. L. R. 605. It should also be noted that the Fifth Amendment does not give immunity against a State prosecution, as it does against a Federal prosecution. *U. S.* v. *Murdock,* (1931) 284 U. S. 141.

Questions which do not, on their face, require incriminating answers necessitate placing the burden of proof on the witness to show he had substantial reason to believe they demand answers tending to incriminate him. *Counselman* v. *Hitchcock, supra; U. S.* v. *Rosen,* (1949) 174 F.(2d) 187, cert. den. 338 U. S. 851. Several recent cases have identified specific types of questions as per se calling for incriminating answers. *Alexander* v. *U. S., supra; Kasinowitz* v. *U. S., supra; Blau* v. *U. S.,* 19 Law Week 4062 (Dec. 11, 1950). The Alexander case points out that a question such as "Do

you know John Doe?" while not necessarily calling for an incriminating answer, will be held as incriminatory in character upon a showing that any connection with John Doe will subject the witness to a criminal charge of any sort. In addition, the Court is required to take the question in its setting, including other questions asked of the witness. *U. S.* v. *Weisman,* (1940) 111 F. (2d) 260. The witness must specifically claim his privilege under the Fifth Amendment, not merely decline to answer the question. Arbitrary or fanciful claims of privilege, however, will not be sustained.

It is clear by now that numerous aspects of the proceedings must be proved to the Court to allow the Court
359 to intelligently decide the issues which may well resolve themselves into questions of law. For example, the use of newspaper clippings has been sanctioned as admissible to show a reasonable apprehension of incrimination (*Alexander* v. *U. S., supra; U. S.* v. *Weisman, supra*), yet this type of evidence must be received with caution. It will certainly not be noticed judicially but must be introduced subject to objections as to relevancy, authenticity and the usual objections to documentary evidence. On a pre-trial motion to dismiss, similar to the motions presented in the cases under consideration here, Judge Caffey of the United States District Court for the Southern District of New York ruled that the procedure in the resolution directing the certification of a case under 2 U. S. C. 192 to the United States Attorney would not be considered on a motion to dismiss, but would be reserved as a matter of defense at the trial. His opinion is reported in *U. S.* v. *Josephson,* (1947) 74 F. Supp. 958, affirmed, in an opinion which did not discuss this point, 165 F.(2d) 82, cert. den. 333 U. S. 838. It should also be noted that the U. S. District Court for the District of Hawaii in the case of *U. S.* v. *Yukio Abe,* Crim. No. 10,335 (Nov. 17, 1950), took cognizance of these problems in deferring a ruling on a motion to dismiss identical to those presented here until the trial

of the general issue. Nothing but confusion would result from trying these cases in a piecemeal manner. These several motions to dismiss may undoubtedly be raised with propriety during the course of the trial when there is sufficient evidence before the Court to show the incriminating characteristics of the answers as well as the proper claim of immunity. However, the Court is not in a position to resolve the issues as a question of law at the present stage of the proceedings, and the several motions to dismiss are accordingly overruled.

JAMES R. KIRKLAND
Judge

January 31, 1951

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360 Filed Feb 26 1951

Praecipe.

Deft. hereby waives his right to a trial by jury and requests a trial by Court.

THOMAS QUINN

ALLAN R. ROSENBERG
1741 K St. N.W.

DAVID SCRIBNER
11 E. 51 St.

Attorneys for Defendant

Consented to:

CHARLES B. MURRAY
Asst. U. S. Atty.

Approved:

JAMES R. KIRKLAND
Judge

Dated Feb. 26, 1951

* * * * * * * * * *

361 Filed Feb 26 1951

Jury Verdict.

On this 26th day of February, 1951, came the attorney of the United States; the defendant in proper person and by his attorneys, David Scribner and Alan Rosenberg; whereupon the defendant waives trial by jury and the attorney of the United States consenting thereto, and with the approval of the Court, the trial proceeds.

It is adjudged by the Court that the defendant is Guilty as indicted; and thereupon it is ordered by the Court that the defendant be committed to the District Jail.

By direction of

JAMES R. KIRKLAND
Presiding Judge
Criminal Court # 4

HARRY M. HULL, *Clerk*
By OCSAR ALTSHULER
Deputy Clerk

Present:

UNITED STATES ATTORNEY
By CHARLES MURRAY
Assistant United States Attorney

M. A. DEEDS
Official Reporter

* * * * * * * * * * *

362 Filed Feb 27 1951

Motion in Arrest of Judgment.

Defendant moves the Court to arrest judgment herein on the ground that the indictment does not charge an offense; that the Court has no jurisdiction over the subject matter; that there was no duly created Sub-Committee of the House Committee on Un-American Activities as alleged in the in-

dictment, and for all the reasons heretofore urged in Defendant's Motion to Dismiss, filed February 26, 1951.

By his Attorneys,

DAVID SCRIBNER
11 East 51st Street
New York 22, N. Y.

ALLAN R. ROSENBERG
1741 K Street, N.W.
Washington, D. C.

Dated: February 26, 1951

* * * * * * * * * * *

363 Filed Feb 27 1951

Motion for New Trial.

Defendant moves the Court to grant him a new trial for the reasons urged in defendant's Motion to Dismiss, Motion for Judgment of Acquittal, and Motion in Arrest of Judgment, all of which motions are hereby renewed.

By his Attorneys,

DAVID SCRIBNER
11 East 51st Street
New York 22, N. Y.

ALLAN R. ROSENBERG
1741 K Street, N.W.
Washington, D. C.

Dated: February 26, 1951

[Government Exhibit No. 1 is the same document as Quinn Exhibit No. 1.]

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506 Filed May 21 1951

Judgment and Commitment.

On this 18th day of May, 1951, came the attorney for the government and the defendant appeared in person and by counsel, Allan R. Rosenberg and David Scribner,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of Vio. Sec. 192, Title 2, U. S. Code, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) months, and to pay a fine of ($500.00) five hundred dollars.

It Is Adjudged that the said defendant be further imprisoned until payment of said fine or until otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

James R. Kirkland,
United States District Judge.

By .....
Deputy Clerk.

(Signed) Harry M. Hull
Clerk.

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508

Criminal Docket.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 1744-'50

UNITED STATES

v.

THOMAS QUINN

Attorneys:
U. S. Attorney
Alan Rosenberg and David Scribner

Charge:
Vio. Sec. 192, Title 2, U. S. Code

Bond:
1. $1500 M. E. O'Connor

G. J. No. Orig.

Date		Proceedings
1950		
Nov	20	Presentment and Indictment filed (1 count)
	22	Bond fixed by the Court at $1500.00. TAMM, J.
	24	ARRAIGNED, Plea NOT GUILTY entered; 25 days, etc. Attorney Alan Rosenberg present, appearance entered, filed. MATTHEWS, J. Cert. filed 11/27/50
	24	Recognizance $1500.00 taken with Margaret E. O'Connor, surety filed.
Dec	19	Defendant's motion to dismiss indictment and for other appropriate relief and points and authorities in support thereof, filed.
		Affidavit of Albert J. Fitzgerald, filed.
		Affidavits (2) of David Scribner, filed.
		Affidavit of Thomas Quinn, filed.
		Exhibits 1 thru 7, filed.

Date		Proceedings
1951		
Jan	12	Motion to Strike Certain Documents Filed in Support of Motion to Dismiss, filed.
		Memorandum of Authorities in Support of Government's motion to Strike Certain Documents, filed.
		Memorandum of Authorities in Opposition to Motion to Dismiss Indictment and for Other Appropriate Relief, filed.
	19	Defendant's supplemental affidavit in support of motion to dismiss indictment on the ground that the Grand Jury was illegally constituted and exhibits 1, 2, 3, 4, 5, 6, 7, 8, filed.
509		Supplemental Page No. 1
Jan	19	Government's motion to strike certain documents filed in support of motion to dismiss granted.
		Order striking affidavits and exhibits filed. KIRKLAND, J.
		Motion to dismiss indictment argued and submitted.
		Supplemental Affidavit in support of motion to dismiss indictment on the ground that the Grand Jury was illegally constituted, stricken. KIRKLAND, J. Attorneys Alan Rosenberg and David Scribner present.
	26	Motion of defendant to dismiss indictment heretofore argued and submitted, Denied.
		Order and Opinion, filed. KIRKLAND, J. (N)
	31	Opinion re: Motion to dismiss, filed. KIRKLAND, J. (N)
Feb	26	With consent of U. S. Attorney and approval of the Court; Defendant waives his right to trial by jury; Waiver of trial by jury filed;

TRIAL by Court begun:

Date	Proceedings
	FINDING: Defendant guilty as indicted; Cert. filed.
	SENTENCED to Imprisonment for a period of Four (4) months to Twelve (12) months and to pay a fine of One Thousand ($1,000.00) Dollars; (J. I.) Defendant committed to District of Columbia Jail. Commitment issued. Attorneys David Scribner, Alan Rosenberg present. KIRKLAND, J.
27	Defendant's motion in arrest of judgment, filed.
	Motion for New Trial, filed.
	Notice of Appeal, filed. Clerk's Fee $5.00 paid.
	Recognizance on Appeal $1500.00 fixed by Court; KIRKLAND, J.
	Recognizance on Appeal $1500.00 taken with Margaret E. O'Connor, surety, filed.
	Stipulation designation Record on Appeal, filed.
27	Motion to transmit original records and exhibits to Court of Appeals, filed.
	Order granting motion to transmit original records and exhibits to Court of Appeals, filed. KIRKLAND, J.
	Motion for new trial and Motion in Arrest of Judgment Heard and Denied. KIRKLAND, J. Cert. filed.
	Judgment and Commitment of 2/26/51, filed. KIRKLAND, J.
	Order vacating judgment and commitment of 2/26/51 (4 mos. to 12 mos. and to pay a fine of $1,000.00), filed. KIRKLAND, J.
	SENTENCED to Imprisonment for a period of One (1) year and to pay a fine of Five Hundred ($500.00) Dollars.
	Defendant remanded to the District of Columbia Jail.

Date	Proceedings
510	Supplemental Page No. 2
Feb 27	Attorneys David Scribner and Alan Rosenberg present. KIRKLAND, J.
28	Judgment and Commitment of 2/27/51, filed. KIRKLAND, J.
	Order: Judgment and Commitment of 2/27/51, vacated; order of 2/27/51 (vacating judgment and commitment of 2/26/51) vacated; Filed. Attorney Alan Rosenberg present. KIRKLAND, J.
Mar 9	Notice of Appeal, filed.
	Clerk's Fee $5.00 paid and credited to U. S.
16	Defendant's Designation of Record, filed.
29	Transcript of Proceedings Pages 1-18 and 1-133, filed.
Apr 2	Government's Exhibit No. 1, filed.
4	Stipulation for extending time for filing and docketing record on appeal, filed.
	Order extending time for the filing and docketing of the records on appeal until May 11, 1951, filed. KIRKLAND, J.
12	Cost for preparing record on appeal. Clerk's Fee $1.55.
	Praecipe changing address of Attorney Allan R. Rosenberg to: 707-711 Columbian Bldg., filed.
May 14	Mandate from the U. S. Court of Appeals for the District of Columbia Circuit Dismissing the appeal without prejudice, filed.
18	Judgment of 2/26/51 vacated and set aside.
	SENTENCED to Imprisonment for a period of Six (6) months and to pay a fine of Five Hundred ($500.00) Dollars; to be committed until payment of fine; (J. I.)
	Defendant remains on bond, pending appeal; Attorneys Alan Rosenberg, David Scribner present. KIRKLAND, J.

Date	Proceedings
19	NOTICE OF APPEAL, filed. Clerk's Fee $5.00 paid and credited to United States.
21	Judgment and commitment of 5/18/51, filed. KIRKLAND, J.
	Order of May 18, 1951 vacating judgment and commitment, filed. KIRKLAND, J.
24	Defendant's motion to transmit original records and exhibits to Court of Appeals, filed.
May 25	ORDER granting defendant's motion to transmit original records and exhibits to the U. S. Court of Appeals for the District of Columbia Circuit, in connection with defendant's appeal from the Judgment of this Court entered 5-18-51, filed. KIRKLAND, J.
June 4	Transcript of Proceedings, Pages 1-4 filed.
June 5	Stipulation designating record on appeal, filed.

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II.

TESTIMONY AND PROCEEDINGS.

1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal No. 1744-50

UNITED STATES OF AMERICA

v.

THOMAS QUINN, *Defendant.*

Washington, D. C.,
February 26, 1951.

The above-entitled action came on for hearing on the merits before HONORABLE JAMES R. KIRKLAND, United States District Judge, at 11:30 a.m.

Appearances:

In behalf of the United States:
CHARLES B. MURRAY, Assistant United States Attorney.

In behalf of the defendant:
DAVID SCRIBNER, ESQ., and ALLAN R. ROSENBERG, ESQ.

* * * * * * * * * *

3 PROCEEDINGS

The Court: There is before the Court this morning the case of the United States vs. Thomas Quinn, Criminal No. 1744-50. Are both sides ready to proceed?

Mr. Scribner: May I respectfully make an application at this time to the Court? This morning, as Your Honor probably knows, Judge Letts in this district found one of the defendants involved in these contempt proceedings guilty and he was committed pending sentence.

At this time, I am right in the midst of trying to draw up the necessary papers for an application for a writ of

habeas corpus in respect to bail pending sentence. Moreover, last week we had the case of the United States vs. Thomas J. Fitzpatrick; we took evidence in that case before Judge Morris in this district. Judge Morris said that he would hear argument in that case from counsel on Tuesday afternoon, that is tomorrow afternoon.

This case is more or less related to the Fitzpatrick case in that, as will appear from the evidence as we go along, Mr. Quinn, the defendant here, referrd back to the record in the Fitzpatrick case in relation to the assertion of the privilege.

With that as a preface, I respectfully ask this Court for a continuance of this matter until Thursday morning. Our schedule is as follows in these cases: Tomorrow afternoon we have the argument before Judge Morris on the Fitzpatrick case; on Wednesday we have the trial in the case of the United States vs. Matles.

I am certain that if this were continued until Thursday, we will be able to maintain the schedule that apparently Judge Laws wanted retained in setting these cases down the way he did before the respective judges, and I respectfully urge on this Court that we be given the opportunity to, first, work on the question of bail for one; and for two, to go into the Fitzpatrick case which is very directly related to this case.

I am somewhat embarrassed in these proceedings because of the schedule of cases in that even the very nature of the evidence that I would produce depends in some instances on prior rulings of the Courts here which are held within two days of each other, then trials which are held within two days of each other.

May I again respectfully urge that we continue this case until Thursday.

The Court: The matter of continuance, of course, resides within the Court. This particular case, to the Court's knowledge, has been set for more than two weeks. I cannot see how it depends on the record of other cases. It

appears not to be a long case. I will be very happy to accommodate counsel, sit late today, sit tonight, if necessary, and I will now formaily overrule the motion.

Are you gentlemen ready to proceed? Is Thomas Quinn in Court?

Mr. Scribner: Yes.

The Court: Very well. I believe originally that there was a demand of a jury trial and counsel had sent word ahead that they intend to waive that; has that been done?

Mr. Scribner: Yes, indeed. I was just about to write out now a written waiver unless there is a form prepared. I can do that in a moment.

The Court: How close to completion is your form?

Mr. Scribner: It will take me about three minutes to do it.

The Court: Here is a praecipe you can use, which both counsel must sign and the defendant himself, as well.

(Counsel and the defendant signed the praecipe.)

The Court: You gentlemen may proceed.

Mr. Murray: May I make a brief opening statement, if the Court please?

The Court: You can make it brief, if you will, because I spent the weekend looking at the pleadings in the matter and the record in the cause.

Mr. Murray: Yes, sir. As Your Honor will have observed, the indictment contains only one count on charges that the defendant refused to answer a pertinent question when he appeared before a sub-committee of the Committee on Un-American Activities of the House of Representatives in this District on August 11, 1949.

The one question that he was asked was whether he was or ever had been a member of the Communist Party. That is, of course, we concede an incriminating—could be an incriminating question, could call for an incriminating answer.

The Government anticipates that the defense in this case will be that the defendant rightfully refused to answer this question in that he claimed his right to be excused from answering it on the ground that it might tend to incriminate him which would be violative of his protection under the Fifth Amendment. The Government will take the position that when he appeared as a witness and when he did refuse, he did not assert his claim against such incrimination but based it upon another and invalid reason, that is, that the Committee had no right to ask the question.

Mr. Quinn, when he answered the question, in addition to what little he said, additionally adopted in full what a previous witness, Thomas J. Fitzpatrick, had said in regard to why he was not answering questions, when Mr. Fitzpatrick appeared the day before.

It would seem necessary, therefore, in presenting our evidence to call the Court's attention to what Mr. Fitzpatrick said.

7 We have just one witness, if the Court please, Mr. Tavenner, the counsel for the Committee.

The Court: Does counsel for the defendant desire to make an opening statement?

Mr. Scribner: Just a word or two. We will show, first, there was an assertion of the privilege against self-incrimination by the adoption by the defendant of the statements made by Mr. Fitzpatrick, who, in turn, we claim asserted the privilege against self-incrimination.

The question itself, moreover, which appears as the count in the indictment, as Your Honor indicated in the motions to dismiss, is the kind of question which would be incriminating per se, that is, the answer to it might be incriminating per se.

Moreover, we say that there was, and the record will show that there was, reasonable cause for apprehension and as we develop this matter, I am sure that Your Honor will agree that the defendant should be acquitted under the circumstances.

The Court: Very well. Call your witness, I understand you have only one witness.

Mr. Murray: That is right, Your Honor.

The Court: Does either side require the rule on witnesses?

Mr. Scribner: No, sir.

8 Mr. Murray: We have not been.

The Court: I understand both sides waive the rule on witnesses.

Mr. Scribner: That is true.

Thereupon **Frank S. Tavenner** was called as a witness on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Murray:

Q. Mr. Tavenner, will you state to the Court your full name, please? A. Frank S. Tavenner.

Q. And will you spell the last name? A. T-a-v-e-n-n-e-r.

Q. Mr. Tavenner, are you an attorney-at-law? A. I am.

Q. And a member of what Bar? A. The Virginia Bar.

Q. Will you state what official position you held in Virginia? A. I was Assistant United States Attorney for the Western District of Virginia with headquarters at Roanoke, Virginia, from 1933 until 1940, at which time I be-

9 came United States Attorney and served in that capacity in the Western District of Virginia until July 31, 1948; with the exception of two and a half years at the end of that period when I was on loan to the International Prosecution Section in Japan, on loan to the Army.

Q. Now, what is your position, Mr. Tavenner? A. I am now counsel for the Committee on Un-American Activities of the House of Representatives.

Q. And have been since what date? A. May 1, 1949.

Q. Did you conduct the interrogation of the defendant here, Mr. Quinn, when he appeared as a witness before that Committee? A. I did.

Mr. Murray: If the Court please, I am permitted to say that it is stipulated that the printed transcript of the hearings is an accurate transcript of what occurred, and perhaps I should have the copy here identified by exhibit number.

The Court: Yes, I think it is in order.

Mr. Murray: Government Exhibit No. 1.

(Hearings regarding Communist infiltration of labor unions—Part 1, August 9, 10 and 11, 1949, was marked Government Exhibit No. 1 for identification.)

The Court: May I ask counsel does that accord with the understanding that a copy of the record of the hearings before the Committee on Un-American Activities of the House of Representatives, 81st Congress, First Session, covering the dates August 9, 10 and 11, 1949, and printed for the use of the Committee on Un-American Activities, will be received in evidence under an oral stipulation of counsel that the matter there printed does contain an accurate transcript of the testimony that was given on the date of August 11, 1949, by the defendant at the Bar, Thomas Quinn. Is that correct?

Mr. Scribner: We so stipulate.

The Court: Very well.

(Government Exhibit No. 1 for Identification was received in evidence.)

By Mr. Murray:

Q. Mr. Tavenner, the record on page 633 of Government Exhibit No. 1, being the printed transcript of this and other hearings of around that date, shows that this hearing occurred on Thursday, August 11, 1949, beginning at 10:50 a.m. in Room 226, Old House Office Building. Is that where it did happen? A. Yes, that is correct.

Q. That is located in the District of Columbia, correct? A. Yes, sir.

Q. It further recites that Mr. Wood said let the Committee be in order, the hearing is being conducted today by a subcommittee: Messrs. Walter, Harrison, Velde, and Wood.

11 At that time, were those gentlemen members of the Committee and was Mr. Wood Chairman of it? A. That is correct.

Q. How many members were there in the full committee, Mr. Tavenner? A. There were nine members of the Committee, one of whom was inactive at that time.

Q. At the time Chairman Wood made the statement which I have read that the Committee which he named of four individuals, was conducting the hearing, was the defendant present? A. He was.

Q. The record later on indicates that he had counsel available; he said he had counsel available. Did any attorney appear for him there formally, to your recollection? A. My recollection is that counsel did not appear formally at the witness table.

Q. When Chairman Wood announced that the hearing would be conducted by the subcommittee, was any point made by the defendant or anybody on his behalf, or was any point made by anyone present then or later in that hearing as to the validity of the subcommittee or its right to sit as announced?

Mr. Scribner: May I respectfully urge an objection at this time to the question on the ground that it is wholly immaterial as to whether or not there was such ob-

12 jection or comment made.

The Court: I will overrule you and permit the question in view of the situations we had in the case of Bryan vs. United States, Trumbo vs. United States, and others.

You may answer, Mr. Witness.

The Witness: No, sir.

The Court: May I ask you at this point before I forget, you mentioned one member of the Committee was inactive.

Will you tell us, please, in what sense he was inactive, health, assignment to another committee, or what degree he was inactive?

The Witness: He was no longer actively sitting as a member of the Congress and was not in Washington.

Mr. Murray: It might help the Court if you give his name.

The Witness: Parnell Thomas.

The Court: I see. Now, Mr. Murray was asking you about the counsel. Do you have any recollection counsel was present with defendant at the Bar; was any reference made to counsel?

The Witness: I recall having asked the witness the question of whether or not he was represented by counsel and his reply was to the effect counsel was close at hand and could be reached if there were any necessity for doing so.

The Court: Did he indicate how close at hand that counsel was, whether within the city, the building, the
13 hearing room, or where he was?

The Witness: No language was used that would indicate where he was. It was a matter of inference only.

The Court: Very well. You may continue.

By Mr. Murray:

Q. Did you at that time know Mr. Scribner? A. I did.

Q. Do you recall whether he was in the Committee room at the time of this particular appearance of Mr. Quinn as a witness? A. I saw Mr. Scribner in the hearing room several times when I happened to look up during the course of the taking of the testimony of various witnesses. I would be unable to definitely state the moment that I observed him there, though he did appear, I believe, at the afternoon session at the witness table with another witness.

Mr. Murray: I propose now, if the Court please, to read the proceedings beginning with the interrogation of Mr. Quinn.

The Court: Very well, it is in order and you may do so.

Mr. Murray: The reading will begin at Page 633 of the printed pamphlet identified in this case as Government Exhibit No. 1:

"Mr. Tavenner. Mr. Quinn, are you represented
14 by counsel?"

The Court: I think it begins actually before that; is there a showing the witness was sworn?

Mr. Murray: Yes, perhaps I had better go back. I thought I had read that, but believe I have not.

"Mr. Wood. Let the committee be in order.

"This hearing is being conducted today by a sub-committee composed of Messrs. Walter, Harrison, Velde, and Wood. Mr. Walter, Mr. Harrison, and Mr. Wood are present.

(Representative Velde enters.)

"Mr. Wood. Also Mr. Velde is present.

"Are you ready to proceed?

"Mr. Tavenner. Yes, sir. Mr. Thomas Quinn.

"Mr. Wood. Will you hold up your right hand, please. You solemnly swear the evidence you give to this sub-committee will be the truth, the whole truth, and nothing but the truth, so help you God?

"Mr. Quinn. I do.

"Mr. Wood. Have a seat."

I think I may say the stipulation, if the Court please, includes the stipulation the defendant at the Bar was the Mr. Quinn referred to here in the transcript of proceedings.

Then, the title of the proceedings from then on:

"Testimony of Thomas Quinn

15 "Mr. Tavenner. Mr. Quinn, are you represented by counsel?

"Mr. Quinn. I have counsel available. I don't feel that I am on trial, but if the turn of events seems to indicate that, I may call for counsel.

"Mr. Tavenner. I merely mention it so that you may understand you have the right to consult counsel at any time you may desire in the course of your testimony.

"Mr. Quinn. Thank you.

"Mr. Tavenner. Will you please state your full name?

"Mr. Quinn. Thomas Quinn."

Unless the Court prefers it otherwise, I thought I would just omit repeating the names, Your Honor.

The Court: It is your pleasure. My own thought is to make the record complete by reading everything that appears.

Mr. Murray: Very well, sir. On page 634:

"Mr. Tavenner. What is your place of residence?

"Mr. Quinn. 201 Beach Street, East Pittsburgh.

"Mr. Tavenner. When and where were you born?

"Mr. Quinn. Pittsburgh, Pa., August 10, 1917.

"Mr. Tavenner. Do you appear here as a witness before the committee in pursuance to a subpoena served on you on August 3, 1949?

"Mr. Quinn. I do.

15-A "Mr. Tavenner. Where are you presently employed?

"Mr. Quinn. I am presently employed by the International Union of the United Electrical, Radio and Machine Workers. I am on leave of absence from the Westinghouse Electric Corp.

16 "Mr. Tavenner. In what capacity are you employed by the union?

"Mr. Quinn. As a field organizer.

"Mr. Tavenner. Is that a field organizer of the local, or of the national organization?

"Mr. Quinn. The national organization.

"Mr. Tavenner. Are you also a member of local 601?

"Mr. Quinn. I am.

"Mr. Tavenner. How long have you been a member?

"Mr. Quinn. Since 1940.

"Mr. Tavenner. Will you please state for the record, in chronological order, the various positions that you have held in that union?

"Mr. Quinn. In Local 601?

"Mr. Tavenner. Yes.

"Mr. Quinn. I was a section steward from 1944 to 1947.

"Mr. Tavenner. Have you held any other positions than the one you have mentioned in the parent organization?

"Mr. Quinn. I was a district representative working in District 6 from 1947 until 1949.

"Mr. Tavenner. Do you hold any position in the Civil Rights Congress at the present time?

"Mr. Quinn. I am chairman of the Western Penn-
17 sylvania Civil Rights Congress.

"Mr. Tavenner. Do you hold any position in the East Pittsburgh section of the Communist Party?

"Mr. Quinn. No; I don't.

"Mr. Tavenner. Are you now or have you ever been a member of the Communist Party?"

I may pause in the reading to call to the Court's attention, it is that question on which the count of the indictment is based.

Resuming the reading:

17-A "Mr. Quinn. I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.

"Mr. Wood. And for those reasons you decline to answer the question?

"Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the position taken by Brother Fitzpatrick yesterday.

"Mr. Wood. Did you hear his statement yesterday?

"Mr. Quinn. Yes; I did.

"Mr. Wood. Do you support it in its entirety?

"Mr. Quinn. In its entirety.

"Mr. Wood. Is there anything else you want to add to it?

"Mr. Quinn. No; I don't.

"Mr. Wood. Will you accept it as the expression
18 of your views, then?

"Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

"Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

"Mr. Quinn. I hold that the Constitution holds sacred the rights of people—

"Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

"Mr. Quinn. I decline to discuss with the committee questions of that nature.

"Mr. Wood. Proceed, Mr. Tavenner.

"Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters, so I will ask you this: Do you know Mr. James J. Matles?

19 "Mr. Quinn. Yes.

"Mr. Tavenner. What position does he hold in this union?

"Mr. Quinn. He is director of organization.

"Mr. Tavenner. For the parent organization?

"Mr. Quinn. For the international union.

"Mr. Tavenner. And Mr. Julius Emspak, what position does he hold, do you know?

"Mr. Quinn. Secretary-treasurer.

"Mr. Tavenner. And Mr. James Lustig, what position does he hold?

"Mr. Quinn. I don't know Mr. James Lustig.

"Mr. Wood. Spell it, Mr. Counsel.

"Mr. Tavenner. L-u-s-t-i-g.

"Mr. Quinn. I don't know him.

"Mr. Tavenner. I have no further questions.

"Mr. Wood. Mr. Walter.

"Mr. Walter. No questions.

"Mr. Wood. Mr. Harrison.

"Mr. Harrison. I have no questions.

"Mr. Wood. Mr. Velde.

"Mr. Velde. Are you acquainted with Mr. Steve Nelson?

"Mr. Quinn. I am not.

"Yesterday one of the Congressmen on the committee made the statement that people brought down here were being given an opportunity to clear themselves, as it were. I would like to say I don't feel it is an opportunity to clear myself. I feel the opportunity I am given here is a choice of clearing myself at the price of assisting this committee and destroying the Constitution, and I could not join the committee in doing that.

"Mr. Wood. You have made quite clear your position. I, for one, do not agree with you, but I appreciate your forthrightness in stating it to us.

"Mr. Quinn. I think it is clear this hearing was called solely for the purpose of interfering with our election.

"Mr. Wood. I concede you have the right to have that opinion.

"Mr. Quinn. The Pittsburgh papers yesterday indicated that clearly. I would like to call attention to an article that appeared in the Pittsburgh Post-Gazette yesterday. It was written by Ingrid Jewell, who is sitting back here.

"Mr. Woods. There is nothing in the newspapers that emanates from this committee.

"Mr. Quinn. The thing I wanted to point out—

"Mr. Wood. You can't charge against this committee or its activities anything a newspaper says, so I am
21 not going to permit you to read into the record anything from a newspaper.

"Mr. Quinn. Very well.

"Mr. Wood. You will be excused."

That concludes the reading on the interrogation and answers of Mr. Quinn at page 636.

By Mr. Murray:

Q. Mr. Tavenner, calling your attention to the statement of Mr. Quinn in the course of his testimony, reading again so it will be exact, from page 634:

"Did you hear his statement yesterday?"

Meaning Mr. Fitzpatrick's statement.

Mr. Quinn says: "Yes: I did."

Do you recall independently whether this defendant, Mr. Quinn, was present the previous day when Mr. Fitzpatrick gave his testimony?

A. I recall independently that I saw him off and on during the course of the taking of the testimony of other witnesses, but I cannot recall the particular witness who may have been on the stand at the time I saw him.

Mr. Murray: Your Honor, that is all that we have to offer indicating that Mr. Quinn did adopt Mr. Fitzpatrick's statement. I would be disposed now to read that to the Court, Mr. Fitzpatrick's, I mean, in order to show what Mr. Quinn meant.

22 The Court: Any objection, Mr. Scribner?

Mr. Scribner: No objections at all.

The Court: You may read it, Mr. Murray.

Mr. Murray: I have gone through Mr. Fitzpatrick's; to get the impression, if the Court please, the only way to

bring out what he said is to read it all because his comments upon his position in regard to answering questions are interspersed throughout his own interrogation. I am reading now from page 599, the proceedings of Wednesday, August 10, 1949, United States House of Representatives, subcommittee of the Committee on Un-American Activities, Washington, D. C.

"A subcommittee of the Committee on Un-American Activities met, pursuant to call, at 11:20 a.m., in room 226, Old House Office Building, Hon. John S. Wood (chairman) presiding.

"Committee members present: Representatives John S. Wood (chairman), Burr P. Harrison, John McSweeney, Morgan M. Moulder, and Harold H. Velde.

"Staff members present: Frank S. Tavenner, Jr., counsel; Louis J. Russell, senior investigator; Donald T. Appell, investigator; John W. Carrington, clerk; Benjamin Mandel, director of research; and A. S. Poore, editor.

"Mr. Wood. Let the committee be in order.

"Let the record show that this hearing is being
23 conducted by a subcommittee, designated by the chairman composed of Mr. Moulder and Mr. Wood.

"Mr. Tavenner: We are ready to proceed.

"Mr. Wood. Proceed.

"Mr. Tavenner: Mr. Thomas Fitzpatrick.

"Mr. Wood. You solemnly swear the evidence you will give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

"Mr. Fitzpatrick. I do.

"TESTIMONY OF THOMAS J. FITZPATRICK

"Mr. Tavenner. Mr. Fitzpatrick, are you represented by counsel?

"Mr. Fitzpatrick. One is available, if I need him.

"Mr. Tavenner. I just want to inform you that you are entitled to have counsel present with you if you desire.

"Mr. Fitzpatrick. Yes. I noticed that yesterday, and I think it is a very good procedure of the committee.

"Mr. Wood. You understand, also, that you are at liberty to confer with your counsel at any time you desire during the progress of your testimony.

"Mr. Fitzpatrick. Thank you, sir.

"Mr. Tavenner. Will you state your full name and present address?

"Mr. Fitzpatrick. Thomas J. Fitzpatrick, 915
24 Ramsey Street, Wilkinsburg, Pa.

"Mr. Tavenner. When and where were you born?

"Mr. Fitzpatrick: January 15, 1903, Lord, Md.

"Mr. Tavenner: Are you appearing before the committee in accordance with a subpoena served upon you August 3, 1949?

"Mr. Fitzpatrick: Yes, sir.

"Mr. Tavenner. What is your present employment?

"Mr. Fitzpatrick. I am a drill press operator in the company, working for the Westinghouse Corporation in East Pittsburgh, 26 years continuous service there. At the present time I am on a full-time union job, chief steward of the local union.

"Mr. Tavenner. Is that Local union 601?

"Mr. Fitzpatrick. That is right, sir.

"Mr. Tavenner. Please outline in chronological order the offices you have held in Local union 601 of the United Electrical, Radio and Machine Workers of America, CIO.

"(Representative McSweeney enters.)

"Mr. Fitzpatrick: In 1937 or 1938, or both, I was a section steward. In 1940 and 1941, I think—this is the best of my recollection, I could be off a year— I was division steward of the generator division. In 1943 and 1944 I was the president of local 601. In 1945 I was the chief steward for part of the year, and the last part of
25 the year I was elected president of District 6. I was president of District 6 until January of 1948, at which time I resigned as president of District 6 and was elected president of Local 601 at that time and went back to 601.

"In 1949 I was elected chief steward in local 601.

"Mr. Chairman, I noticed that you permitted some preliminary remarks here yesterday, and I know it is the hope of a lot of people that this committee will conduct itself in a more democratic manner than it did in the past, so I would like to respectfully request an opportunity to make a few preliminary remarks.

"Mr. Wood The Chair will give you that opportunity, but not on the theory of the previous conduct of this committee. If you would like to make a few preliminary remarks, the Chair will permit you to do so, provided it is not too lengthy, because the House meets in 30 minutes.

"Mr. Fitzpatrick: I will not filibuster.

"In the hearings yesterday, us four fellows who were subpoenaed to appear today were smeared and charged with certain things, and Mr. Tavenner here read part of a telegram that we sent to you. He either consciously or unconsciously only mentioned part of that telegram. He failed to mention the fact—

"Mr. Wood. If you take exception to the part he
26 did put in, I will instruct that the entire telegram be put in the record.

"(The telegram referred to is as follows:)

"(WESTERN UNION telegram)

August 7, 1949

"Representative John S. Wood,
"Chairman of the House Un-American Activities Committee,
"Washington, D.C.

"House Un-American Activities Committee has subpoenaed us four members of Westinghouse East Pittsburgh Local 601, UE-CIO to testify next Wednesday in hearing on ridiculous charges of an ACTU priest and his followers. It is vital you understand that important elections in which we are all candidates will take place in our local union

next week and that our union is in the midst of wage negotiations with the Westinghouse Electric Co. We strongly protest interference by your committee in our internal union affairs. We would like to point out that this investigation has been instigated by an ACTU priest, Rev. Charles Owen Rice, and his right-wing followers in UE local 601 in order to maintain his grasp on the local. We are informed they contacted someone on your committee and had hearings set and subpoenas issued without the knowledge of most members of the committee. We
27 protest this scandalous use of the Un-American Activities Committee to interfere in the internal affairs of our union and aid the Westinghouse Co. in our negotiations. Now that your committee has the facts, we respectfully request that you abandon the hearings and take steps to see that your committee is never again used in this manner.

"Thomas J. Fitzpatrick,
"Frank Panzino,
"Thomas Quinn,
"Robert Whisner.

"Mr. Fitzpatrick. With the understanding it is in the record, I would like to make this brief statement. We are in the midst of an election in 601 and us four fellows subpoenaed for today are candidates in that election.

"It is also stated here that these hearings do not harm the negotiations between the UE and the Westinghouse Co. The witness who is national negotiator from our local either does not know his job or he has deliberately misstated the facts. The negotiations started in June or July and went on for several weeks and were recessed. Negotiations are not concluded and they are subject to being reopened by the union, at the call of the union.

It has come to my attention that in the last day, since the hearings became an issue, one of the vice presi-
28 dents of the Westinghouse Co. has sent out a letter to all Westinghouse employees stating that irregard-

less of what any other corporation does, Westinghouse is going to grant no wage increases this year.

"Mr. Wood. You are commenting on the contents of a letter. Do you have a copy of the letter.

"Mr. Fitzpatrick: I do not have it here.

"Mr. Wood. Would you like to insert that letter in the record?

"Mr. Fitzpatrick. We will get it in your hands.

"Mr. Wood. Let the record show that the witness desires to incorporate in the record at this point the letter to which he has referred, from an officer of the Westinghouse Co.

"(Witness failed to supply letter.)

"Mr. Fitzpatrick. I would like to state that Mr. Russell went to great length yesterday to explain that these hearings were not hurriedly called, but that certain people had been contacted last April. That is true, and there was certainly time to call the hearings earlier or wait until after our election.

"It is a known fact that these hearings were rigged by a Jesuit priest, Charles Owen Rice, and two members of the ACTU—Association of Catholic Trades Unionists—who contacted a member of this committee, Con-
29 gressman Walter, and he referred them, I believe, to Mr. Russell, and from that point on these hearings were rigged.

I wish to state, Mr. Chairman, that the prestige of this committee has been lowered plenty, whenever they stoop to interfere in local union elections at the behest of a sectarian religious organization.

"I would like to say that I think this committee has not only misused, but abused, the power granted to it by the Congress; and I say they have prostituted the prestige of the whole Congress by permitting this committee to be used in such manner. I would think an investigation of this action by the committee would be in order, because if there is any kind of un-American activity, I would put it in that category where a respected committee of this Congress

stoops to be used by a sectarian religious organization—

"Mr. Wood. We don't want any argument from you. We will listen to any statement of fact you desire to make.

"Mr. Fitzpatrick. It interferes in a factional squabble in a local union. I think this committee was originated for a little better work than that.

"Already these hearings bring the phony charge that it is defense work and secret work that is the basis of this investigation. The testimony yesterday gave the lie to that thing. The witnesses all agreed that Local 601 is not
30 dominated by Communists; therefore it gives a lie to this whole charge. We have a half million people in UE, and they have all been smeared by this sort of thing. All you have to do is look at the record of UE, before the war or during the war and after the war, and you will find that not one case of sabotage or disloyalty has been brought forth and proven. In addition to that, you know and everyone else knows, that everybody on secret work has prior approval of the Army or Navy or proper agency of the Government.

"I would like to say, Mr. Chairman, in conclusion, that I appear here today with certain people questioning my loyalty to this country. Two kinds of people meet before your committee, people who say they are good Americans, and people who act like good Americans.

"I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.

"The Constitution of this country provides certain
31 protection for minorities and gives the privilege for people to speak and think as they feel they should and want to. It also gives the privilege that people can

have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

"Mr. Wood. What is?

"Mr. Fitzpatrick. The right of the people guaranteed by the Constitution.

"Mr. Wood. We are not trying to invade anybody's rights.

"Mr. Fitzpatrick. I have read the hearings of this committee for some time, and some are pretty low.

"Mr. Wood. Do you have any questions you want to ask, Mr. Tavenner?

"Mr. Tavenner. Yes, sir.

"Mr. Fitzpatrick, are you now or have you ever been a member of the Communist Party?

"Mr. Fitzpatrick. Mr. Chairman, in my opening remarks I gave quite a bit of my attitude on this question. I say that this committee has no right to pry into my mind.

"Mr. Wood. We are not concerned with your
32 opinion of the committee. We have asked you a simple question. Do you want to answer it or not?

"Mr. Fitzpatrick. I am answering it, Mr. Chairman.

"Mr. Wood. We don't have the time for a long dissertation

"Mr. Fitzpatrick. I think I have a right to answer it in my own way.

"Mr. Wood. The question can be answered "Yes" or "No," or you can decline to answer it.

"Mr. Fitzpatrick. Being just a common workingman, I will answer it in my own words. I don't think the committee has the right to dictate the choice of my words in answering it.

"Mr. Wood. We are not attempting to do that. You may answer or decline to answer.

"Mr. Fitzpatrick. I will answer the question. The Constitution guarantees the right to me and every other citizen

to have beliefs, whether they are popular or unpoular, and to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Constitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here.

"Mr. Wood. Now will you answer the question?

33 "Mr. Fitzpatrick: I have answered the question.

"Mr. Wood. It is not an answer at all.

"Mr. Fitzpatrick: That is my answer.

"Mr. Wood. Do you mean that is the only answer you are going to give?

"Mr. Fitzpatrick. That is the way it has to be answered, according to my conscience.

"Mr. Wood. Is that the only answer you will give to the question whether you are now or ever have been a member of the Communist Party?

"Mr. Fitzpatrick. That is the only answer I can conscientiously give you.

"Mr. Tavenner. Mr. Fitzpatrick, you were present yesterday during the testimony here. You heard it stated under oath that you are a member of the Communist Party. Do you deny that accusation?

"Mr. Fitzpatrick. The answer to my previous question is the answer to this question. I have no intention of permitting this committee to abridge my constitutional rights on political opinions, associations, who I work with, who I meet with, what I read or think, or anything of that kind.

"Mr. Tavenner. So, in other words, you refuse to answer the question?

"Mr. Fitzpatrick. I don't refuse to answer the

34 question. I have answered the question.

"Mr. Tavenner. I think, out of fairness, I should read this affidavit to you, which I am going to introduce in evidence. It is an affidavit by Clarence D. Copeland, in which he says—

that he knows Thomas J. Fitzpatrick, chief steward of local No. 601, United Electrical, Radio, and Machine Workers of America; that he has known the said Thomas J. Fitzpatrick for approximately the last 10 years; that sometime during the fall of the year 1943, the said Thomas J. Fitzpatrick gave to and requested that he, the said Clarence D. Copeland, sign an application and join the Communist Party; that he, the said Clarence D. Copeland, refused to sign said application or join the said Communist Party.

"Did you request that he sign an application, as stated in that affidavit?

"Mr. Fitzpatrick. Mr. Chairman, if you want to ask me questions about my actions of loyalty, question my loyalty, you have a right to do so, and I will answer them. So far as my political opinions, I have stated my position on that. You are asking the same questions in a different way. But if my memory is right, there was no such thing as a Communist Party when that affidavit is supposed to have been.

35 Mr. Tavenner. In 1943?

"Mr. Fitzpatrick. I think it was the Communist Political Association, then.

"Mr. Tavenner. Was it the Communist Political Association, then, that you tried to get him to join?

"Mr. Fitzpatrick. I have given you my answer.

"Mr. Tavenner. In other words, you will not answer whether you did or did not solicit his membership?

"Mr. Fitzpatrick. I will not talk about my association and actions with people who I know, what I did, or anything else. I don't think it reflects on my loyalty or disloyalty or anything else.

"Mr. Wood. Mr. Fitzpatrick, did you ever at any time during the year 1943 furnish an application blank and request Clarence D. Copeland to sign and make application for membership in the Communist Political Association, or the Communist Party?

"Mr. Fitzpatrick. Mr. Chairman, do I have to give you my answer again?

"Mr. Wood. I just want to know whether you did that one thing.

"Mr. Fitzpatrick. I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.

"Mr. Wood. And for that reason do you decline
36 to answer the question?

"Mr. Fitzpatrick. I stand on the protection of the Constitution, the First and Fifth Amendments.

"Mr. Wood. And for those reasons decline to answer the question further?

"Mr. Fitzpatrick. I have answered the question.

"Mr. Wood. I say, do you decline to answer it further?

"Mr. Fitzpatrick. I have no further comment on it.

"Mr. Tavenner. Were you a candidate for political office in the State of Pennsylvania in 1948?

"Mr. Fitzpatrick. Mr. Chairman, for the reasons that I have reiterated more than once, this committee is going beyond its powers to delve into any of my political activities, thoughts, or anything else.

"Mr. Tavenner. Were you endorsed for office by the Daily Worker, the official organ of the Communist Party?

"Mr. Fitzpatrick. I don't know who endorsed who or for what. I have no intention of discussing my political actions or activities with this committee, for the reasons that I have stated before.

"Mr. Tavenner. The Daily Worker of May 25, 1947, page 9, lists you as the signer of a statement sponsored by the Civil Rights Congress opposing attacks on Communism. Are you a member of the Civil Rights Con-
37 gress?

"Mr. Fitzpatrick. I say it is no affair of the committee what organizations I belong to. The previous answer applies.

"Mr. Tavenner. In other words, Mr. Fitzpatrick, you are just determined that you are not going to give any testi

mony before this committee regarding Communist activities in union 601?

"Mr. Fitzpatrick. I came here and I stated that if you have any questions about any actions that I have committed, I will answer. So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation.

"Mr. Wood. That is about the fourth time you have repeated that, Mr. Fitzpatrick. You can simplify that and save time by saying on the grounds that you have previously given you refuse to answer.

"Mr. Fitzpatrick. Mr. Chairman, if you will talk to your counsel and ask him not to ask the same question in six or seven different ways, he wouldn't be getting six or seven identical answers.

"Mr. Wood. I don't mind getting six or seven identical answers, but I don't like to have six or seven repetitions of grounds for refusing to answer. Do you intend
38 to answer the question or not? If you don't want to answer it you can decline to answer for reasons you have already given.

"Mr. Fitzpatrick. I know time is short, and I don't want to take up your time more than anybody else. Mr. Chairman, advise your counsel not to repeat the question.

"Mr. Wood. The only way we can seek information is to ask for it.

"Mr. Fitzpatrick. The only way I can answer a question is to answer it when it is asked.

"Mr. Wood. That is your answer?

"Mr. Fitzpatrick. Yes.

"Mr. Tavenner. I have no further questions, Mr. Chairman.

"Mr. Wood. Mr. McSweeney.

"Mr. McSweeney. You made a charge against the committee that we were trying to interfere in the election of your local. May I say I have been in constant touch with

men, including Father Rice and others, trying to ascertain whether a delay in the hearings would be beneficial. In other words, the committee does not want to interfere in any election. After getting all the information I could from every source I could, it was decided it was best for the hearings to proceed on the date set forth in the subpoenas. I think every member of the committee made a conscientious effort to find out the facts, and we were advised it was best for the hearings to proceed. That is the result of my own investigation.

"Mr. Fitzpatrick. Did your investigations show—

"Mr. Wood. The witness has no right to interrogate a member of the committee.

"Mr. Fitzpatrick. Mr. Chairman, I make certain allegations here.

"The Congressman is inferring that what I said is not true.

"Mr. McSweeney. Not at all. I am merely saying I made an effort, and I think every member of the committee did, to try to ascertain whether it was important to have the hearings go ahead as scheduled. We did not want to interfere with the election of the local in any way.

"Mr. Fitzpatrick. Certainly, if you asked a murderer if he killed a man, he would deny it. Seeking information from Father Rice, who instigated this thing, certainly he would give information to further his purposes. I think the evidence will show this hearing was rigged up to serve as a sounding board for the newspapers to carry hogwash in 601, because the people running against us are bankrupt; they have no program for the people; and they are stooping to this.

"Mr. McSweeney. May I say it was because of a long-distance call I received from Father Rice that I made a further investigation. I was not influenced by him. I sought every source I could, and it was determined it was best for the hearings to proceed as scheduled.

"Mr. Fitzpatrick. The damage is done. The committee has been used.

"Mr. Wood. Mr. Moulder.

"Mr. Moulder. In what manner and how will these hearings affect your election?

"Mr. Fitzpatrick. The Pittsburgh newspapers will have headlines this high (indicating) distorting everything that I say here, or reporting very little of what I say here, but reporting everything the other fellows have said.

"Mr. Moulder. You haven't said anything yet that would clear you of the charges made against you.

"Mr. Fitzpatrick. The charges I am making are against this committee for interfering with an election.

"Mr. Moulder. How are we interfering with an election?

"Mr. Fitzpatrick. By calling this hearing at this time, taking us out of circulation, and providing a sounding board for the hogwash that is going out.

"Mr. Moulder. You have been given an opportunity to deny you are a Communist, but you have refused to deny it.

"Mr. Fitzpatrick. The opportunity you give me
41 is to join with you and these other witnesses who appeared here yesterday and say the Constitution is a scrap of paper and it gives no protection to the people and you fellows have a right to delve into the mind of everybody who comes here. If I was a Congressman, I wouldn't say that was an opportunity.

"Mr. Moulder. You say the hearings were rigged in order to affect your local election.

"Mr. Fitzpatrick. And also to disrupt the negotiations, or have an effect on the negotiations.

"Mr. Moulder. Do you mean the hearings would reveal you are a member of the Communist Party and a candidate for election, and therefore they might affect the result? Is that what you mean?

"Mr. Fitzpatrick. Not at all.

"Mr. Moulder. What are you a candidate for?

"Mr. Fitzpatrick. Delegate to the national convention, delegate for District 6.

"Mr. Moulder. You said you had been for many years reading with interest the hearings of the Committee on Un-American Activities.

"Mr. Fitzpatrick. I said I read some. I don't have the time to read them all, like the witness here yesterday who reads months and months and months. I have to
42 work for a living.

"Mr. Moulder. What caused you to be so interested in the hearings of this committee in the past?

"Mr. Fitzpatrick. This committee and other subcommittees of the Congress seem to make it a practice to find that it is necessary to investigate the UE just about the time there is a convention or an election—in 1946, 1947, 1948, and 1949.

"Mr. Moulder. This committee is not investigating the UE.

"Mr. Fitzpatrick. That is what they have done in the papers.

"Mr. Moulder. You have been subpoenaed before the committee and given an opportunity to clarify all these 'hogwashing' charges.

"Mr. Fitzpatrick. I have been given an opportunity to tear up the Constitution, and I refuse to do it.

"Mr. Moulder. You say you will answer questions about any acts you have committed.

"Mr. Fitzpatrick. That is right.

"Mr. Moulder. Don't you feel the Congress of the United States has a right to interrogate people as to their beliefs and what is their hope for the future in those beliefs?

"Mr. Fitzpatrick. I think the Congress has no
43 such rights, and I think if you will read the Constitution you will see that. Do we have thought control in the United States now? Are you going to convict people on thinking? I think maybe you fellows should read that Constitution.

"Mr. Moulder. That is what you have to do to be a good constitutional lawyer, just read the Constitution.

"Mr. Wood. Mr. Harrison.
"Mr. Harrison. No questions.
"Mr. Wood. Mr. Velde.
"Mr. Velde. No questions.
"Mr. Wood. You may be excused. Thank you, sir."

Mr. Murray. That concludes the testimony of Mr. Fitzpatrick to which Mr. Quinn referred to in his own testimony on the following day.

By Mr. Murray:

Q. Mr. Tavenner, it appears that the hearing at which Mr. Quinn appeared was held on August 9 and from the transcript, which contains other hearings also, it appears that that was the third day of a three-day hearing which began on August 9 and continued into August 10 and then August 11.

I will ask you if you will state to his Honor briefly the purpose of these particular hearings of those three days, with particular reference, of course, to the present defendant. If I may call your attention, you did state the
44 purpose at the beginning of the hearings on August 9, page 541. I am sure you may refer to that, if you need to, to answer the question. A. I believe the best answer I could give would be to read the purpose as announced at the time and possibly I can then add a little more to it.

Q. Yes. A. A statement was made at the beginning of this hearing which lasted several days as follows:

"Mr. Chairman, the purpose of this hearing is to inquire into the question of Communist affiliation or association of certain members of Local 601 of the United Electrical, Radio and Machine Workers of America, CIO, which is engaged in work at industrial plants important to the national defense.

"The advisability of recommending legislation providing for security standards, and the advisability of tighten-

ing present security requirements in industrial plants working on certain Government contracts, was considered by the committee in both its open and executive sessions on June 6, 1949, as a result of the testimony of Leona and Joseph Franey and Loren G. Haas.

"It will be remembered that Mr. Wood, the chairman of this committee, offered H. R. 3903, section 2 of which would make it an offense for any individual employed in connection with the performance of any national defense
45 '(1) to become or remain a member of, or affiliated with, the Communist Party of the United States of America, or any organization which shall have been designated as subversive by the Attorney General; (2) to contribute funds or services to the Communist Party of the United States of America or to any organization which shall have been designated as subversive by the Attorney General; or (3) to advise, counsel, or urge any other individual employed in connection with the performance of any national defense contract to perform, or to omit to perform, any act if such act or omission would constitute a violation of clause (1) or (2) of this section.' This bill was referred to this committee.

"It is the further purpose of this hearing to develop facts for the committee's consideration in connection with this resolution."

Q. Do you care to make any further amplification of that statement of the purpose of? A. I may add that in connection with the investigation which the staff had made, it was discovered that there were no security standards applied by the Army to members of the National Organization of the UE. By that I mean persons who held national positions in the National Organization as distinguished from the local. It was discovered that the Atomic Energy Commission recognized the advisability and neces-
46 sity of applying the security standards to those officers. That entire matter of construction, or difference of construction by the Army and by the Atomic En-

ergy Commission was involved in the hearings, though testimony relating to that particular subject did not come out in this particular hearing other than to lay the foundation for it by showing who were members of the National Organization and what, if any, their communist affiliations may be.

Q. In that connection, I call to your attention a portion of the record I have already read. I will repeat this from page 634:

"Mr. Tavenner. In what capacity are you employed by the union?

"Mr. Quinn. As a field organizer.

"Mr. Tavenner. Is that a field organizer of the local, or of the national organization?

"Mr. Quinn. The national organization."

And it was, you say, the officers of the national organization who were exempt from the loyalty tests applied by the Army? A. As construed by the Army; and that was made the subject of a report to Congress, a recommendation to Congress.

Mr. Murray: That concludes the direct examination of the witness.

47 The Court: Very well. I think it would be in order at this time to take our usual and customary recess until 1:45.

(Thereupon, at 12:30 p.m., a recess was taken until 1:45 p.m. of the same day.)

AFTER RECESS

(The trial was resumed at 1:50 o'clock p.m., pursuant to the taking of the noon recess.)

Mr. Murray: If the Court please, may I ask permission to reopen the direct examination very briefly?

The Court: Yes, the cross-examination has not begun, and you have that latitude.

Thereupon **Frank S. Tavenner, Jr.**, resumed the witness stand and was examined and testified further as follows:

Direct Examination—Continued

By Mr. Murray:

Q. Mr. Tavenner, there was some question, in your examination, about whether you had an independent recollection of Mr. Scribner's being present at the time Mr. Quinn was being examined, and you have during the recess examined the record again. Will you state your present recollection in regard to that? A. Yes, sir. I am afraid that the testimony I gave might be subject to an improper inference. I stated that I knew Mr. Scribner was there during the morning, as I had seen him off and on, and that I knew that he appeared as a witness that afternoon, I mean appeared with the witness Whisner on the afternoon of that day. Now I find, in looking up the record, that Mr.
49 Quinn did not testify on the day to which I referred, and that he testified, that is, Mr. Quinn, on the following day. Therefore, my answer, having been intended to refer only to the day on which Mr. Whisner testified, should be corrected or made clear.

Mr. Murray: May I at this time, if Your Honor please, make a statement?

Mr. Scribner has informed me that he was in New York on the day of this examination. On the basis of that, I stipulate to the fact that Mr. Scribner was not present in the hearing room at the time Mr. Quinn was a witness.

The Court: Very well, sir.

Mr. Murray: I should like, I don't think it would be inappropriate as a part of the examination of Mr. Tavenner, to state a stipulation. I suppose I may state it, that on August 7, 1949, the Committee on Un-American Activities, the full committee, was in existence, having been previously organized, and the members of it were those whom I will now name:

John S. Wood, Chairman, of Georgia; Francis E. Walter, of Pennsylvania; Burr P. Harrison, of Virginia; John McSweeney, of Ohio; Morgan M. Moulder, of Missouri; Richard M. Nixon, of California; Francis Case, of South Dakota; Harold H. Velde, of Illinois; and another member, then inactive, Parnell Thomas, of New Jersey. I
50 think there is an initial before Mr. Thomas' name.

The Court: J., J. Parnell.

Mr. Murray: J. Parnell Thomas.

That concludes the direct examination, thank you, Your Honor.

The Court: Mr. Scribner?

Cross-Examination

By Mr. Scribner:

Q. Mr. Tavenner, was Mr. Quinn subpoenaed for August 10, 1949, do you recall? A. I could only determine by looking at other records that I have here.

Q. If you have any other records, and if there is no objection by the Court, will you—

The Court: You may look at any records to refresh your recollection.

A. (Inspecting documents.) He was subpoenaed to appear before the committee on Wednesday, August 10, 1949.

By Mr. Scribner:

Q. Were Mr. Tom Fitzpatrick and Mr. Frank Panzino subpoenaed for the same day, do your records disclose, or do you have any recollection of it? A. I do not have any record before me, but I am confident that that is correct.

Q. So that Mr. Quinn waited around from the time
51 he was subpoenaed until August 11, when he actually testified? A. I may say the committee was very busy, and they met as promptly and as long as they were able to meet on that day, on the 10th, and they were not able to complete all of it, the testimony of all the witnesses subpoenaed for that day, according to my recollection.

Q. Do you recall that all three witnesses—Mr. Quinn, the defendant here, Mr. Tom Fitzpatrick, Mr. Frank Panzino—did appear pursuant to the subpoena on August 10, 1949? A. Yes, and also Mr. Robert C. Whisner.

Q. That is quite right, thank you. Now, you stated the purpose of the committee hearing was one related to hearings regarding Communist infiltration in labor unions, as it appears on page 541 of Government's Exhibit 1. That is a transcript of the hearings. That purpose applied to all three days of the hearing, did it not? A. That is correct.

Q. And it applied specifically to the hearing conducted in respect to Mr. Quinn, did it not? A. It did.

Q. You have already testified in another proceeding, have you not, that it was the purpose of the committee, in examining the witness, to fully explore the question of Communist infiltrations of the particular witnesses
52 before the committee, and particularly Mr. Tom Fitzpatrick, Mr. Frank Panzino, and Mr. Thomas Quinn, the defendant in this proceeding? A. That is right.

Mr. Scribner: I have no further questions of the witness.

Mr. Murray: No redirect, if the Court please.

The Court: You may stand aside.

(Witness excused.)

Mr. Murray: The Government rests, if Your Honor please.

Mr. Scribner: May I at this time reserve my motion for acquittal until after the defendant's case? It is merely a matter of putting in some additional evidence by stipulation, as was done before.

The Court: Yes, you may do that.

Mr. Murray: Will you be needing the witness, Mr. Tavenner?

The Court: Mr. Tavenner may remain if he chooses or go if he pleases.

Mr. Tavenner: Thank you, sir.

The Court: I will release you subject to call by the District Attorney.

Mr. Tavenner: I think I shall go.

Mr. Scribner: It is stipulated by and between the Government and the defendant that the following are
53 true and accurate excerpts from the transcript of "Hearings Regarding Communist Infiltration of Labor Unions, Part 1, Local 601, United Electrical, Radio, and Machine Workers of America, C. I. O., Pittsburgh, Pennsylvania, August 9, 1949."

I am going to read at this time into the record, if it please the Court, those excerpts from the transcript which were stipulated as true and accurate. I will give the page reference as I go along and the precise place at which it appears on the specific page.

At page 542, the testimony of Louis J. Russell:

"Mr. Tavenner. In what capacity are you employed by this committee?

"Mr. Russell. As senior investigator.

"Mr. Tavenner. How long have you been so employed?

"Mr. Russell. Since May, 1945.

"Mr. Tavenner. Prior to that time, where were you employed?

"Mr. Russell. By the Federal Bureau of Investigation."

At page 544:

"Mr. Tavenner. With what industrial plant is the union, Local 601, associated?

"Mr. Russell. Westinghouse Electrical Manufacturing Company.

54 "Mr. Tavenner. Is it engaged, to your knowledge, in work for defense projects at this time?

"Mr. Russell. Not at the present time, to my knowledge, but it has been engaged in defense projects in the past and has performed work for the Atomic Energy Commission."

At page 545:

"Mr. Tavenner. Before hearing testimony of the officers and members of Local 601 I desire to offer, as general

background material, the testimony of Mr. Joseph Zack Kornfeder, who will describe the operations of the Communist International of Moscow over a broad field of activity, including that of labor unions."

Now, page 580, with respect to the testimony of Mr. Charles Edward Copeland:

"Mr. Tavenner. What is your present occupation?

"Mr. Copeland. Business agent of Local 601, United Electrical, Radio and Machine Workers of America, CIO."

At page 583, about the middle of the page:

"Mr. Tavenner. Did you ever attend any Communist Party meetings?

"Mr. Copeland. I have.

55 "Mr. Tavenner. Do you recall how many and the various locations where the meetings were held?

"Mr. Copeland. I attended about three meetings of the Party, which were open meetings to the public, in the Penn-Lincoln Hotel, at Wilkinsburg; and I attended one meeting in Serbian Hall in Wilmerding, which was exclusively for Party members.

"Mr. Tavenner. Were other members of Local 601 present at those meetings?

"Mr. Copeland. Yes.

"Mr. Tavenner. Can you name some among those present?

"Mr. Copeland. Myself; Frank Nestler; Thomas J. Fitzpatrick; Frank Panzino; and Robert Whisner.

"Mr. Tavenner. Are any of these persons presently associated with Local 601?

"Mr. Copeland. Yes, sir.

"Mr. Tavenner. Which ones?

"Mr. Copeland. Thomas J. Fitzpatrick, who is chief steward of the local; and Frank Panzino, who is assistant chief; and Robert Whisner, who is subdivision steward of of the local union.

"Mr. Tavenner. What are the duties of the chief steward of the union, as distinguished from division or subdivision steward?

56 "Mr. Copeland. The chief steward is elected at the beginning of the year by the stewards' council, and has the function of handling grievances."

At page 584, again about the center of the page:

"Mr. Tavenner. Would you say that the stewards' council in your local is under Communist control?

"Mr. Copeland. No, sir.

"Mr. Tavenner. Are any of its officers Communists?

"Mr. Copeland. I would say Fitzpatrick and Panzino are Party members.

"Mr. Wood. Will you mind indicating what you base that opinion on?

"Mr. Copeland. I attended Party meetings they were at.

"Mr. Wood. Communist Party meetings?

"Mr. Copeland. Yes.

"Mr. Wood. At that time you were affiliated with the Communist Party?

"Mr. Copeland. That is right.

"Mr. Tavenner. In other words, you base your statement upon the fact you attended Communist Party meetings with them?

"Mr. Copeland. That is correct."

Now, at page 585, about one-third down the page:

57 "Mr. Tavenner. Do you know of any persons who are on the executive board who are active in Communist Party affairs?

"Mr. Copeland. I would say Thomas J. Fitzpatrick is active in Communist Affairs. I say that because recently the executive board of the union, at the request of the veterans' committee, put a picket line around Carnegie Hall in Northside Pittsburgh, and Fitzpatrick crashed through the picket line to attend a mass meeting of the Communist Party."

At page 587, at the very top of the page:

"Mr. Copeland. If we have adequate laws—I believe myself a Communist is a traitor to the country, but I be-

lieve if I, as a leader, would be found guilty of a crime, I don't think my children or neighbors should be deprived of working at Westinghouse because I am guilty of the crime. I think I should be punished and not the people I represent."

And down about the middle of the same page, that is, page 587:

"Mr. Russell. I have one further question: When were you first interviewed by an agent of this committee, the approximate date?

58 "Mr. Copeland. First of all, I was subpoenaed to appear before the Federal Bureau of Investigation, Immigration Service, by a gentleman by the name of Benson, I believe, to testify against a former member of the union who was up for deportation. If I am not mistaken, Alvin Stokes, who is a colored man, first talked to me around February or March of this year, somewhere around that time. I can't tie the dates down, but it was around about the time they were picking up Steve Nelson for questioning."

At page 588, with respect to the testimony of Mr. William Henry Peeler, reading from the top of the page:

"Mr. Tavenner. Are you a member of Local 601 of the United Electrical, Radio, and Machine Workers of America, CIO?

"Mr. Peeler. Yes, sir."

Then going down towards the bottom of the same page:

"Mr. Tavenner. Were you approached by others to become a Communist Party member?

"Mr. Peeler. Yes, at the office.

"Mr. Tavenner. What office?

"Mr. Peeler. Local 601.

"Mr. Tavenner. Tell us all about that.

"Mr. Peeler. A fellow there told me he wanted to

59 talk to me. His name was Nathan Alberts. He approached me."

Mr. Murray: May I interrupt? The statement of Mr. Tavenner was, "Tell us about that." You put the word "all" in there.

Mr. Scribner: Did I? (Inspecting document.)

Mr. Muray: Two or three lines up. "Tell us about that."

Mr. Scribner: Yes, I'm sorry.

May I have that correction made? My enthusiasm sometimes runs away with me.

May I have the last statement?

(The reporter read the last statement, as follows:)

"His name was Nathan Alberts. He approached me."

Mr. Scribner: Thank you.

"Mr. Tavenner. Did you join?

"Mr. Peeler. No, sir.

"Mr. Tavenner. Tell us what occurred on that occasion."

Then, continuing on page 589:

"Mr. Peeler. So, I was lined up with the rank and file group, and he came up one evening and said he would like to talk to me. He said what a bunch of reactionary boys I was associated with, and some of the things they had done to Negro members of the local.

60 "I said I didn't see where anybody had done anything in particular for the Negro members in the plant. He said Fitzpatrick and Panzino had done a terrific job in getting Negro girls in the plant. I said, 'What happened?' He said, 'We got them in there.' I said, 'Is that part of your job?' He said, 'Yes.' I said, 'I don't see that that is anything to yell about.' He said, 'Why not join the Party? We are the only ones to do anything for your race.' I said, 'Name somebody in your party who has done something for my race.'

"He mentioned the incident of the Negro girls, which I mentioned before, plus a couple of other incidents where Panzino and Tom Quinn had done something for them and

somebody had cut out their pictures and called them a '———— lover,' and so forth.

"I said, 'Anybody else?'

"He named one or two others that I know and some I didn't know. I continued listening to him, and a couple times I rode home with him, and I asked him what he did in the evenings, and he said he did his Party work. I asked him if he didn't do anything but work, and he said no, that he wanted to help make this a better world. I said
61 I didn't care to have it a better world in that way. I didn't join.

"Mr. Tavenner. In his discussions with you, did he mention other members of the Communist Party in the Union?

"Mr. Peeler. He mentioned that two who had done the most, as he claimed, to help the Negro people. They were Tom Fitzpatrick and Frank Panzino. Another day he mentioned Ella Piazzo, a girl in the union office."

At page 592, from the testimony of Blair Seese, at the very top of the page:

"Mr. Tavenner. Where are you now employed?

"Mr. Seese. Westinghouse Electric Corporation, at the East Pittsburgh Plant.

"Mr. Tavenner. Are you appearing before this committee by virtue of a subpoena served upon you on August 3, 1949?

"Mr. Seese. I certainly am.

"Mr. Tavenner. Are you a member of Local 601 of the United Electrical, Radio and Machine Workers of America, CIO?

"Mr. Seese. I am."

At page 593, about one-third down the page:

62 "Mr. Tavenner. During that period of time, was Mr. Thomas J. Fitzpatrick a member of the executive board?

"Mr. Seese. He was.

"Mr. Tavenner. Do you of your own personal knowledge know whether he was a member of the Communist Party?

"Mr. Seese. Other than the fact that when I was in Tom Fitzpatrick's presence privately he had admitted to me that he was a member of the Party."

Now, one question down on the same page:

"Mr. Tavenner. Has any action been taken in your union with regards to the Communists now on trial in New York?

"Mr. Seese. I do know of petitions that were circulated to the membership in support of the 12 Communists who are on trial in New York."

At page 595, from the testimony of Stanley D. Glass, about one-third down the page:

"Mr. Tavenner. When were you first interviewed by an investigator of this committee?

"Mr. Glass. To the best of my knowledge it was in April, 1949.

"Mr. Tavenner. Are you a member of Local 601 of the United Electrical, Radio and Machine Workers of
63 America, CIO?

"Mr. Glass. I am."

Then skipping a few questions on the same page:

"Mr. Tavenner. Have you ever been approached to join the Communist Party or any Communist-affiliated associations?

"Mr. Glass. I have.

"Mr. Tavenner. When was that?

"Mr. Glass. In 1941 or 1942 I was working in a shop close to Thomas Fitzpatrick. I was taking him home one night and he told me what a marvelous country Soviet Russia was, and asked me to join the Party.

"Mr. Tavenner. What Party?

"Mr. Glass. The Communist Party."

At pages 596, at the bottom of the page:

"Mr. Tavenner. With regard to your local union itself, that is, Local 601, has there been a time when it was under Communist Party domination?

"Mr. Glass. Local 601 itself at various times is controlled by the Communist Party. It is done through their methods of approach. They themselves attempt to keep the membership away and keep in control a small centralized caucus of the progressive forces. All people who are members of the progressive forces are not members
64 of the Communist Party, but they sure follow the Communist line.

"Mr. Wood. And they are well organized and very active?

"Mr. Glass. That is right.

"Mr. Tavenner. Have there been any resolutions passed by Local 601 that would follow the Communist Party line?

"Mr. Glass. Yes; there have been.

"Mr. Tavenner. Will you elaborate?

"Mr. Glass. A resolution supporting the ILD—International Labor Defense—which is a Communist-front organization. A resolution calling Roosevelt a warmonger.

"Mr. Tavenner. What about a resolution with regard to Harry Bridges?

"Mr. Glass. There is one supporting Harry Bridges.

"Mr. Tavenner. Was there one supporting American-Soviet friendship?

"Mr. Glass. American-Soviet friendship, absolutely.

"Mr. Tavenner. American Youth Congress?

"Mr. Glass. American Youth Congress.

"Mr. Tavenner. League Against War and Fascism?
65 "Mr. Glass. Yes."

At this time I would like to offer all those excerpts in evidence as a part of the defendant's case.

The Court: Very well. Is there any objection, Mr. Murray?

Mr. Murray: Your Honor, I should like to state my position with regard to that.

The only question here involved is, Are you a member of the Communist Party?

In view of the circumstances which our case showed, I saw no occasion for us to take any position in regard to that, and therefore I wounldn't—I don't dispute that the circumstance existed for the assertion of the claim. The only point we make it that it was not in fact made.

The Court: Very well, I will receive that, Mr. Scribner.

Mr. Scribner. Very well.

(The excerpts just read from the August 9, 1949, portion of the printed transcript were accordingly received in evidence.)

Mr. Scribner: As I understand it, there is no question here about there being reasonable cause for apprehension.

The Court: I understood it was part of your defense and it is received as such.

66 Mr. Scribner: I have some additional stipulations I would like to offer to the Court.

The Court: Very well.

Mr. Scribner: It is stipulated that the following statutes were in force and effect on and prior to August 10, 1949:

What is known as the Smith Act, 18 U. S. Code 2385.

What is known as the False Claims Act, 18 U. S. Code 1001. This was, apparently, formerly, Section 35(a) of the Criminal Code.

What is known as the Federal Conspiracy Act, 18 U. S. Code 371.

What is known as the Labor-Management Relations Act of 1947, 29 U. S. Code 159(a).

It is also stipulated and agreed that prior to August 10, 1949, Communists were indicted for violation of the Smith Act and for a conspiracy to violate the Smith Act, and were on August 10, 1949, on trial for conspiracies to violate the Smith Act, which said actions were widely reported to the public at large through the press, radio, and in other ways.

It is also stipulated and agreed that the report of the Subcommittee on Legislation of the Committee on Un-American Activities—and I quote—"On proposed legislation to control subversive Communist activities in
67 the United States," dated April 10, 1948, issued by the Government Printing Office for public sale and distribution, contains the following statement, at page 3 of that report:

"The Committee therefore recommends that the Justice Department immediately institute vigorous prosecution against Communists in every case where they have been guilty of violating existing laws."

Would Your Honor indulge me just a moment?

The Court: Certainly.

Mr. Scribner: I think I am finished with the stipulations, but I just want to make a last-minute check.

The Court: Certainly.

Mr. Scribner: I have no further evidence to offer at this time.

The Court: The defense rests?

Mr. Scribner: The defense rests.

Mr. Murray: We have nothing further.

* * * * * * * * *

111 The Court: Against the testimony in this case and the very able argument of counsel on both sides, the Court will now pass to the mixed question of law and fact which is raised by the cause of United States of America vs. Thomas Quinn, being Criminal No. 1744-50, an indictment brought by a Grand Jury of this Court under Volume 2 U. S. Code, Section 129.

Perhaps, at the outset, the Court should note that Title 2, Section 192 of the United States Code provides:

"Every person who, having been summonsed as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House or any committee of either

House of Congress, wilfuly makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor."

In a rather broad construction of the statute, two crimes are provided: one, where a person who, having been
112 summonsed as a witness, wilfully makes default, which is clearly not the situation in this case; or, second, who having appeared, refuses to answer any question pertinent to the question under inquiry.

At the outset, the Court feels that the indictment could be noticed, since, against it, whatever guilt or innocence the facts show and the law reveals will have to be reflected.

The indictment in substance is composed of four elements. The first element charges that on a date certain, to-wit, August 11, 1950, and within the District of Columbia, an alleged duly created subcommittee of the Congress was conducting an inquiry pursuant to the law stated in the indictment, being the first element; the second element, that the defendant, Thomas Quinn, appeared as a witness before the subcommittee; and third, was asked the question, whether he was or had ever been a member of the Communist Party, which of course is the gravamen of the situation; and the fourth element, the indictment avers that the question was pertinent to the question then under inquiry before the said subcommittee.

The indictment then concludes with the averment that the said Thomas Quinn did then and there refuse to answer that question.

Now, the immediate problem on the question of jurisdiction and venue as against the charge of the indict-
113 ment, the Government by its evidence has sustained that burden, and the Court finds that as a matter of law, this particular committee, namely, the Un-American Activities Committee of the House of Representatives, was a duly constituted committee under subsection (q)(2), Section 121 of the Legislative Reorganization Act of 1946,

60 Statutes at Large, page 828, and House Resolution 5 of the 81st Congress.

The Court holds as a matter of law that the committee came into being as a result of the statute, and that it had the right under the resolution to investigate Communistic infiltrations of various labor unions, and that the inquiry held on the date of August 11, 1950, occurred in the District of Columbia; and that venue has been proved, and that the activity in which the committee was then engaged was pertinent both to the statute of its creation, and to the direction of the House of Representatives under the resolution, House Resolution 5 of the 81st Congress.

The next question that has arisen by virtue of the order of proof and argument of counsel, is whether or not four members, who the evidence shows were present on the day, constituted a valid subcommittee of the parent committee: namely, the Un-American Activities Committee of the House of Representatives.

The Court finds as a fact that this committee was originally composed of nine members; that by virtue of
114 disqualification of one, it had been reduced to eight in number; and that on the date in question, August 11, 1950, the chairman in charge of the proceedings on the day announced the group as being a subcommittee, and named the four members as composing the subcommittee: namely, Congressmen Walter, Harrison, Velde, and Wood, the chairman.

At the time the meeting apparently first began, three members were physically present, and before the witness in question was sworn to testify, Mr. Velde appeared, and the entire subcommittee, composed of four members, was fully present during the entire hearing of the inquiry of this defendant.

The Court finds as a fact, therefore, that a valid subcommittee was present. The Court further finds, as a matter of law, that no minimum being stated, for the purpose, at least, since one member would have qualified as a subcommittee, a fortiori, four members did compose a sub-

committee of this major and parent body, known as the Un-American Activities Committee of the House of Representatives.

Accordingly, the Court finds that it has both jurisdiction of the offense, and that venue has been proven.

The next two questions, which counsel have argued with force and scholarship, turn upon the remainder of the portion of the statute which declares

"Every person who, having been summoned as a
115 witness by the authority of either House of Congress, and who, having appeared"—and I paraphrase it—refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor.

The next question that resolves itself is whether or not the propounded question—and I quote from page 634 of Government Exhibit 1:

"Are you now or have you ever been a member of the Communist Party?"

At another part of the proceedings, the question was propounded in this form:

"Having made that statement and subscribed to the statements expressed by the witness yesterday to whom you referred, will you now answer the question whether you now have or have ever been a member of the Communist Party?"

The Government has indicated that it relies upon the first question propounded. The Court observes that in the second question propounded in the same inquiry, there is no deviation from the substance of the prior question, and so the question as it is set forth in the indictment, namely, —and I quote from the indictment—"Whether he was or had ever been a member of the Communist Party," raises the question of whether it was pertinent to the inquiry.

The Court finds as a fact and concludes as a mat-
116 ter of law that under the statute creating the committee, and the resolution of Congress that gave it

the power of inquiry, its investigation as a subcommittee into Communistic infiltration of various labor unions was a pertinent question, and accordingly, the question of whether the witness was or had ever been a member of the Communist Party was a proper question to ask.

The Court observes that from the inquiries of this same date, the Congress later enacted the Internal Security Act of 1950. As I say, I hold as a matter of law that such inquiry by the committee was authorized by Public Law 601 of the 79th Congress, Second Session, cited as "Legislative Reorganization Act of 1946," being Section 12(q), and House Resolution 5 of the 81st Congress, which adopted the rulings of the House as set forth in the Act.

It is to be observed also that investigation of Communistic infiltration into specific fields of endeavor has been previously upheld by the courts in the cases of Lawson vs. United States and Trumbo vs. United States, decided in 1949 and reported at 85 United States Appeals, D. C. 167, and certiorari denied 1950, 339 U. S. at page 934.

In that particular instance, the investigation of alleged Communistic infiltration had to do with the moving picture industry and was held a proper subject of inquiry
117 for the House Committee on Un-American Activities, under the Reorganization Act, and certainly would be a proper inquiry on behalf of a subcommittee that appeared therefor.

The Court, therefore, holds on the second point of the indictment that the question was propounded, and holds that it was a matter of law a pertinent question to be inquired of in that particular investigation and inquiry then being conducted.

Now, the question next arises from the force of the indictment, whether the defendant, Thomas Quinn, then and there refused to answer that question.

The Court finds from the record in the cause, and particularly 634 of Government's Exhibit No. 1, that the question was propounded, "Are you now or have you ever been

a member of the Communist Party?" to which the answer was given: "I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions and associations of the American people can be held secret if they so desire."

The question was then asked of him: "And for those reasons, do you decline to answer that question?" to which the defendant at the bar replied, "I didn't say I was declining to answer the question. Before I do answer the question, I would like to say that I support the posi-
118 tion of Brother Fitzpatrick yesterday."

Then there is a colloquy which appears between the witness and the Chairman of the committee, and there is reported in the exhibit, noted as Government's Exhibit 1, that the Chairman asked this question:

"You have stated your position. Having enunciated your sentiments and your position, will you now answer the question, whether you are now or have ever been a member of the Communist Party, or do you decline to answer?"

To that, the defendant at the bar replied:

"I decline to discuss with the committee questions of that nature."

Now, the Court finds from the facts, as the record bears out, that the allegation of the indictment that the defendant then and there refused to answer the question, has been made out, and the Court finds as a fact that he did not answer the question.

The next problem that we face is the question of whether or not he has claimed, by virtue of his position, a personal privilege against self-incrimination or, under the First Amendment to the Constitution, as he expressed it on the stand, whether he could maintain an opinion unto himself concerning that particular matter.

With regard to a broad question as to whether to
119 use the expression, "I rely upon the First, supplemented by the Fifth Amendment," or "I rely upon

the First Amendment to the Constitution of the United States," this Court notes that it has already been resolved in the cases of Lawson vs. United States and Trumbo vs. United States, reported, as I say, in 85 U. S. App. D. C. 167, in which certiorari was denied, 339 U. S., at page 934, that there is no protection in the assertion under the First Amendment of a refusal of a witness to answer such a pertinent question.

The next question that is before us is whether or not, by any reference to the Fifth Amendment, has the privilege of self-incrimination been asserted? At the outset, taking the testimony of the defendant before the bar, the Court finds as a fact that at no point did the defendant assert directly his personal privilege against self-incrimination.

With regard to the defendant at the bar, the Court notes that when he first took the stand, he made the statement—and I quote from the record:

"I have counsel available. I don't feel that I am on trial, but if turns of events seem to indicate that, I may call for counsel."

Mr. Tavenner, the counsel for the Un-American Activities Committee, is reported to have said:

"I merely mention it so that you may understand you have a right to consult counsel at any time you may
120 desire in the course of your testimony."

Now, the Court observes from the record that this defendant is a man of 33 years, that in a period of 9 years' membership with Local 601 of the International Union of the United Electrical, Radio and Machine Workers, he has progressed from a position, first, between the years 1944 and 1947, when he was a section steward, apparently working for the Westinghouse Electric Corporation, until he became employed as a field organizer of the national organization, and that from the position of a section steward he had progressed until he was a chairman of the Civil Rights Congress at the time he appeared and testified, being spe-

cifically Chairman of the Western Pennsylvania Civil Rights Congress.

The Court, of course, has had the defendant before him, notes that he is a man of middle age, has the appearance of a man of intelligence; with the rapid strides he made in such short years, the Court concludes as a fact that he is an able person, a person with ability, a person with education, a person who could understand the position in which he found himself at the time this particular question covered by the indictment was propounded to him.

In his defense, there has been asserted that by the use of the expression, when he answered, "I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel
121 that the political beliefs, opinions and associations of the American people can be held secret if they so desire," and continuing on, the defendant at the bar replied:

"I didn't say I was declining to answer the question. Before I do answer the question, I would like to say that I support the position taken by Brother Fitzpatrick yesterday,"

as against the answer which is in the record:

"I decline to discuss with the committee questions of that nature,"

as well as the expression on his part where the defendant says,

"Yesterday, one of the Congressmen made the statement that people down here would be given an opportunity to clear themselves, as it were. I would like to say I didn't feel it was an opportunity to clear myself. I feel the opportunity I am given here is a choice of clearing myself at the price of assisting this committee and destroying the Constitution, and that I could not join the committee in doing that,"

does not of itself—and the Court finds as a fact—amount to the assertion of the personal privilege against self-

incrimination guaranteed to a citizen by the provisions of the Fifth Amendment.

122 Query: Does his reference to the position taken by Mr. Fitzpatrick the day previous also extend to him?

Since Mr. Fitzpatrick is before another court, and I believe counsel have told this Court that the testimony has been taken, but that the opinion of the Court has not been rendered, the Court will not go into detail of the position which Mr. Fitzpatrick took, other than to say that it certainly left much to be desired as to whether he was actually claiming self-incrimination or not.

It is to be observed that his answers—and I speak of Mr. Fitzpatrick's—were long and rambling. They had a major theme, which seemed to be that the committee was prostituting its office and seeking to aid a rival group in a forthcoming election. But I will not go into detail, which brings me to the question: Can one claim a personal privilege against self-incrimination by reference to a position that another took?

On that, this Court finds as a matter of law that one may not. Since the privilege is personal, the defendant must assert it himself, since another may not know what is in a defendant's mind at the time he is called before the Congress to testify on pertinent matters, to proper inquiry, and therefore, one may not, by reference, assert that privilege.

In summary, the Court makes the following findings of fact and conclusions of law:

123 That the indictment as set forth has been proven beyond a reasonable doubt by the Government.

That this was a duly and properly constituted committee of the House of Representatives, created pursuant to statute.

That this was a valid and subsisting subcommittee, four members of a parent, eight-member full committee.

That the defendant, Thomas Quinn, appeared as a witness; that he was sworn; that he was inquired of whether

he was or had ever been a member of the Communist Party; that the question was pertinent to the inquiry, which the full committee, plus the subcommittee, had the power to inquire.

And the Court finds as a fact that the defendant then and there refused to answer the question.

Now, the Court concludes that:

This defendant has been guilty of a contempt of Congress;

That he has been guilty of a violation of Section 192, Second Volume, U. S. Code;

That at no time did he assert his personal privilege to self-incrimination;

That he did not at any time assert an honest and reasonable apprehension of Federal prosecution;

That he was a capable executive of this union, with a large membership which, as I recall, the record stated had approximately 500,000 members;

That he was a competent person to exercise the
124 privilege in his own behalf.

The Court notes that the Fifth Amendment is available to an honest and reasonable claim, though it is not an avenue to escape or hide something and protect others; and therefore, this defendant, the Court finds from the evidence, did not assert a proper claim of immunity. Accordingly, at this time the Court will enter a judgment of guilty against this defendant.

Now, will you rise, Mr. Quinn?

By virtue of the findings of fact and conclusions of law which the Court has just announced, the Court at this time will find you guilty in Criminal Case No. 1744-50, of a contempt of Congress on the date of August 11, 1950, in your refusal to answer the question, "Whether you were or had ever been a member of the Communist Party," and at this time this Court will remand you to custody.

Mr. Scribner: Will Your Honor at this time consider an application for a continuance of the bail, of the bond on which the defendant has been—

The Court: No, it is the universal practice of the Court, in the return of a verdict of guilty or the finding of a judgment of guilty, to remand the defendant. You may prepare your record if you propose to appeal the matter, and submit the question of bail at a later date.

Mr. Scribner: Was Your Honor considering sen-
125 tence immediately?

The Court: If you would ask me to do so.

Mr. Scribner: May I confer with the defendant for a moment?

The Court: Yes, indeed.

Mr. Scribner: Will Your Honor be a little patient with me; just a moment or two more.

The Court: Certainly, take your time.

Is there any further matter you desire to call to my attention?

Mr. Scribner: The defendant at this time asks this Court to impose a sentence. In connection with that, may I say just a word or two?

The Court: Yes. Before you do, I notice that the indictment in the cause alleges that the date of commission to have been August 11, 1950, and the proof shows the date of August 10, 1950.

However, by the force of Rule 12(b), subsection (2), which reads:

"Defenses and objections based on defects in the institution of the prosecution or an indictment or information other than it fails to show jurisdiction in the court, are to charge an offense which may be raised only by motion before trial. Motions shall include all defenses and ob-
126 jections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof.

"But the court, for cause shown, may grant relief from the waiver. Lack of jurisdiction or failure of the indictment or information of charge and offense shall be noticed by the court at any time during the pendency of the proceedings."

Since the date has been shown by the evidence to have been the 10th, it was charged the 11th, the Court finds no variance as a matter of law, and confirms and ratifies the judgment heretofore entered.

Now, would you be good enough to enlighten me as to some of the background of this young man? Does he have any prior criminal record?

Mr. Scribner: Not so far as I know. He has never been —as a matter of fact, I don't know of his ever having been in a courtroom, even, in any manner whatsoever. This is the first time, and it involved, obviously, some serious questions as to how words would be interpreted.

The defendant himself has lived all his life in Pittsburgh, was born there, his family is there. He has three young children and his wife living now in Pittsburgh. He has always worked in the shop, that is, at the Westinghouse Electric Corporation, for quite a number of years,
127 and has been on and off with the union itself.

As the record shows, he was a steward, he was trusted by the employees, and was elected as a steward, handled their grievances quite satisfactorily. As a matter of fact, his relationship in so far as the employer and the supervision in the plant itself was concerned, was always on a good, solid basis, disagreeing perhaps on methods of approach to a problem, but honest disagreement in the sense that he always acted as an honest steward, as an honest union man; and that is exactly how he approached this problem, too, that is before the Court.

Before I go any further on that, if Your Honor please, just to preserve the record:

I note that I did not make my motion for a new trial and an arrest of judgment. I would like to ask leave of the Court to file that formally in writing, prior to the—

The Court: Since you have asked the sentence to be imposed, you may anticipate a ruling on both.

I believe it would constitute a waiver, but it will be understood that you are preserving your rights for appeal.

Mr. Scribner: Thank you very much, Your Honor.

On the basis of that background of this individual, the very nature of Mr. Quinn himself—he is a fairly young man; as I said, he has very good relationships in town, among his neighbors and friends, and the people he
128 worked with—may I respectfully urge this Court to suspend sentence on him.

The issue itself is one which is going to take considerable time to resolve. It is obviously the kind of isssue that is going to go up through the courts.

To a large extent, I think perhaps, it might well be said that I should be standing in his place and he should be standing in my place, for a very simple reason: because it was my obligation and my duty to advise him as I advise people in the union who go about their union business. It was always my firm belief, as an attorney, as an attorney who has read the cases, the very cases I cited to Your Honor this morning, and as an attorney who thought he understood what the law was, — and I will be perfectly frank to say that I hope that the higher courts will conclude that my initial approach to this problem was correct. Be that as it may, the defendant stands on that side, about to be committed, and I stand on this side.

Now, I refer to that as something to be considered by the Court, something that might be considered by the Court in respect to the sentence of Mr. Quinn. Undoubtedly, whoever it is that does appear before a committee now will at least have reasonable cause for apprehension in an entirely different light than what has been up to date; and witnesses from now on will perhaps see that at least a number of the courts in the District have made a determination
129 that, in the absence of a clear assertion of the privilege against self-incrimination, in so many words, they are in jeopardy if they choose to assert the privilege in any way.

May I again respectfully urge this Court to suspend sentence on Mr. Quinn? His family, as I said, is in Pittsburgh.

They are all young children. I think the smallest is four, the youngest is four, the oldest is eleven.

The defendant himself has no property to speak of. He has lived there, as I said, all his life, he is constantly amenable, and has been amenable, to the order and direction of the Court, and certainly will continue to be amenable to the Court's direction.

That, together with the questions of law which may be involved here, I respectfully urge on this Court, should be grounds for consideration in respect to sentence.

The Court: The Court knows of no more burdensome duty that it ever had than to impose sentence upon one and then fix the proper punishment which should apply.

Of course, we begin the approach on it, that the defendant will stand trial. It is not the case of acknowledgement of guilt in asking leniency at the outset. But we must recognize that in the criminal process under our accusatory system of procedure, the penalty serves two purposes: One, to punish the offender; and second, to act as a deterrent to others from the likelihood of their committing a similar offense.

I think we must take into consideration the unsettled conditions as we find them in the world at large. We must recognize that there is imminent danger to our republican and democratic form of life, aimed even, perhaps, to the very structure of the Government itself.

I think a soldier in the field would certainly appreciate more the opportunity of seeing and observing a uniformed opponent than to know that there must be ones at home who are, by infiltration, by destruction, or by sabotage, by position, influencing the effort of our Government to actually maintain its life and its existence.

We have had precedents for the matter, in that a number of persons similarly situated to the defendant at the bar, thought it was their right and opinion to exercise certain beliefs along the lines which are involved in this case, notably the Hollywood writers.

As I recall, in each one of those cases, each man who appeared before the Court had led an exemplary life. He had never been in trouble before. The matter was passed on not by one, but I think at least by three judges of our court, and in each instance, each of those three judges imposed the sentence of the maximum of 4 to 12 months and a fine of $1,000; and in the position of this defendant, I don't see that an exception can be made.

131 Accordingly, it is the judgment of the Court that you, Thomas Quinn, in Criminal Case No. 1744-50, will be sentenced to serve a term of 4 to 12 months, and that you be fined the sum of $1,000.

Mr. Scribner: Will Your Honor at this time continue the bond, the bail on which the defendant has been—

The Court: Technically, I believe I have ousted myself from the jurisdiction of the defendant, having imposed the final sentence of judgment, and that your remedy lies with the Circuit Court of Appeals here.

What is the position of the Government on that, Mr. Murray?

Mr. Murray: I believe the trial judge does have the function; I believe the Appellate Court prefers that it be exercised first—

The Court: What is the position the Government takes in the matter?

Mr. Murray: I am disposed to oppose bail in this case, Your Honor. I suggest to the Court the lack of jurisdiction, in that the appeal does not involve a substantial question.

As to that, I do not assert confidently just what the merits are of the questions. I simply call the Court's attention to what the questions are: first, the validity of the subcommittee; secondly, whether the defendant asserted his claim.

132 If, in those questions, there is no substantial question for the Appellate Court to decide, the rules say that the Court shall not, that this Court, nor the Appellate Court either, shall not release the defendant on bail.

Passing that for the moment, I formally oppose the exercise of discretion to release him on bail, calling, however, to the Court's attention this situation, which I have thought was worthy of consideration, although it is not a part of the rule.

That is, in misdemeanor cases, where the penalty imposed is necessarily a year or less than a year, it is quite possible for a defendant on appeal to have to serve a good portion of his sentence waiting for the appeal to be heard. Although that consideration has not entered into the making of the rules, I think it not inappropriate to mention it to the Court.

The Court: I am going to make this suggestion. I will continue my present ruling that the defendant be remanded, and ask counsel to perfect his record as early as he can, and renew his motion for bail.

You have a very short record, and I am sure—

Mr. Scribner: To this Court?

The Court: Yes. I will be available at any time throughout the week. I am sitting in criminal term until the first of April. I think you can probably draft it in the
133 next several days.

The Court wants to correct one matter on the record. May I have that indictment, please? (Document handed to the Court.)

The Court notes from Government Exhibit No. 1 that the date on which the defendant at bar actually appeared before the subcommittee was August 11, 1949, whereas the indictment charged on August 11, 1950. That obviously is a typographical error, since the case itself is being tried.

With reference to the date of 1949, the Court finds as a fact that that was the date on which the proceedings were held, and that it is not at variance with the date alleged, "August 11, 1950."

(Thereupon, at 4:25 o'clock p.m., the trial was concluded.)

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135 Washington, D. C.,
February 27, 1951.

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136 PROCEEDINGS

The Court: There is before the Court at the present time in the case of United States v. Thomas Quinn, Criminal No. 1744-50, a motion for a new trial and a motion in arrest of judgment. I notice the presence of Charles Murray, Esquire, Assistant United States Attorney appearing for the Government, and the presence of David Scribner, Esquire and Allan R. Rosenberg, Esquire, appearing for the defendant.

May I ask, first, Mr. Murray, have you received a copy of the motion?

Mr. Murray: I have, Your Honor.

The Court: Your are familiar with them?

Mr. Murray: I am, yes, sir.

The Court: Do you waive the time necessary to reply?

Mr. Murray: I do, yes, sir.

The Court: Do you gentlemen want to argue the motions or will you submit them?

Mr. Scribner: We prefer to submit them, sir.

The Court: Very well. Now, on the motion for a new trial, the Court would have assumed that the different points which are being raised under that motion would have been set forth. The Court does notice that the motion move the Court to grant a new trial for the reasons urged in defendant's motion to dismiss, which is a matter heretofore passed upon by this particular Court, and

137 also the reasons urged in the motion for judgment of acquittal, which is fresh in the Court's mind due to the fact that the case was tried yesterday, and also by reference the reasons in the motion in arrest of judgment, all of which are renewed. On the basis of the motion the Court will now overrule it, passing next to the motion in arrest of judgment. The Court notes that the grounds

raised are that the indictment does not charge an offense that the Court has no jurisdiction over the subject matter, that there was no duly created subcommittee of the House Committee on Un-American Activities as alleged in the indictment, and for all the reasons heretofore urged in defendant's motion to dismiss, the motion in arrest of judgment is pressed upon the Court.

The Court passed specifically upon each of the matters raised under the motion in arrest of judgment which were raised yesterday and, accordingly, now the Court will overrule the motion in arrest of judgment.

Now, Mr. Scribner has informed the Court that he has filed his notice of appeal in this case, that he has filed his designation of record; I believe he has also filed a motion to transmit the original records and exhibits to the Court of Appeals.

Mr. Scribner: Yes, Your Honor.

The Court: The Court notes the presence of the motion to transmit the original records and exhibits to the
138 Court of Appeals and feels in this case the motion is seasonably and well taken, I am going to sign the order which accompanies the motion and direct that the original records and exhibits be transmitted.

Counsel for the defendant has moved me also to admit the defendant to bail pending appeal. In view of the fact that this is a misdemeanor and having in mind the time necessary to perfect the appeal, plus the probability of an argument before the Court of Appeals recesses for the summer months, I think the motion is well taken and the Court will admit the defendant to bail pending appeal on the original penalty of $1,500.

(Thereupon, at 12:05 o'clock p. m., the foregoing proceedings were concluded.)

(At 2:15 o'clock p. m., the following proceedings were had in open court:)

The Court: The court notes the presence of Thomas Quinn, defendant in the case of the United States v. Thomas Quinn, Criminal No. 1744-50, who, on yesterday, Monday, February 26, 1951, the Court held to be guilty of an indictment charging contempt of Congress in violation of Section 192, Title 2 of the U. S. Code.

In order that the records of the Court may be
139 complete, I am at this moment signing the original sentence heretofore imposed on this defendant, namely, a judgment of four to twelve months and to pay a fine of $1,000. However, I have talked with counsel; I would be very pleased, Mr. Rosenberg, if you would elaborate on the matter that was dicussed as to how much this man makes in his employment, whether he owns or rents his home, what his financial situtation is; I would like to hear you.

Mr. Rosenberg: Yes. Your Honor. Mr. Quinn is a welder employed by the Westinghouse Electric Corporation in East Pittsburgh, Pennsylvania. His basic salary is $65 a week; there is overtime or perhaps incentive pay beyond that as the job works out, but that is his basic pay. He does not own his own home, he rents it; he pays $35 a month rent. He is married, he has three children ranging in age from five to eleven. There are two bedrooms in the house—I believe Your Honor asked specifically about that.

The Court: That gives me some idea of the size of the house.

Mr. Rosenberg: I believe it is a frame house, is that correct?

Mr. Quinn: No, it is brick.

Mr. Rosenberg: A brick house. Except for a current bank account to care for current expenses, things of that sort, Mr. Quinn is without any substantial property. Is that correct?

140 Mr. Quinn: That is true.

The Court: I am prepared to modify this sentence. Would you so move in his behalf?

Mr. Rosenberg: I move the Court, if Your Honor please, to decrease the sentence in any way that Your Honor will do so.

The Court: Very well. I am at this time signing an order the effect of which is that the judgment and commitment entered in the above-entitled case on the 26th day of February, 1951, be and the same is hereby vacated, set aside and held for naught.

I desire to observe that the statute declares the punishment in the instant case to be a misdemeanor up to a year and $1,000. There was before me this morning on the motion in arrest of judgment, as well as the motion for a new trial, one proposition which this Court had in mind, the recent case of Robert Lucas v. the United States, decided by our own Circuit Court of Appeals January 25, 1951, and being numbered in that Court, 10,791, wherein there was a date named in the indictment which did not conform to the proof and our Court of Appeals held in substance that under Rule 52-A of the Federal Rules of Criminal Procedure, that it was not an error, defect, irregularity, or variance that would affect substantial rights, and accordingly held it was not prejudicial and it was a clerical error, the same as I held at the close of the testimony in awarding the original judgment.

141 Now, in this case, Criminal No. 1744-50, wherein you, Thomas Quinn, have been found guilty of a violation of Section 192, Title 2 of the U. S. Code, the Court will impose sentence of one year and a fine of $500.

Mr. Rosenberg: Your Honor please, may I respectfully interpose an objection to that part of the new sentence which increases, if it does increase, the penalty from four to twelve months to one year. I, of course, interpose no objection to the fine.

The Court: I think you should note that of record. I have verified the record since and find the penalty is a misdemeanor and the indeterminate sentence under our

statute does not apply. In recognizing it now and correcting it, I desire to have the judgment be correct.

There has been a motion made in behalf of Thomas Quinn for bail. I indicated in his absence that the bail would be granted; in his presence, I set bail on appeal in the same sum as heretofore, $1,500, and J. Louis O'Connor, surety, is acceptable to the Court.

I believe at this time you may go with him and when his bond is renewed, he will be at large under that bond.

Mr. Rosenberg: Thank you very much, Your Honor.

(Thereupon, at 2:25 o'clock p.m., the foregoing proceedings were concluded.)

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142 Washington, D. C.,
February 28, 1951.

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143 PROCEEDINGS

The Court: Are counsel present in the case of United States v. Thomas Quinn? Counsel for the Government and counsel for the defendant, will you approach the trial table, please.

In the case of United States v. Thomas Quinn, Criminal No. 1744-50, this Court found the defendant guilty of the violation of Section 192, Title 2 of the U. S. Code, following the taking of testimony and argument of counsel on Monday, February 26, 1951. At the time and following the close of the testimony, counsel moved the Court to impose sentence. The Court imposed a sentence at the time of four months to twelve months and a fine of $1,000.

At the time, senior counsel in the case, David Scribner, moved the Court orally for a motion for a new trial and the Court's recollection is that the Court directed him to be formal and to file it in writing. There was also a motion made at the time to permit the defendant to remain on bond pending appeal. The Court ordered the defendant re-

manded and told counsel if he would perfect his record on appeal and notify the Court, the Court would consider the matter as soon as that was done.

It was brought to the Court's attention that steps had been taken to perfect the appeal, with the result that the Court saw counsel informally at the noon recess and directed that they be present in the court at 1:45 on
144 Tuesday, February 27, 1951. At that time the defendant was present and the Court took additional information concerning his past history and background, and at that time the Court signed what purported to be an order vacating the judgment and commitment, and indicated that the Court would impose a sentence of one year and a fine of $1,500; the Court remarking at the time that the Court had since, on its own, investigated the matter and discovered that this was a misdemeanor and that our local law required indeterminate sentences only in the case of felonies.

The junior counsel in the case, Mr. Allan Rosenberg, acceded to the reduction in fine and objected to the change of the sentence of four months to twelve months and substituting the one year. I think his point is well taken.

Beyond that, the Clerk of the Court, Mr. Harry Hull, has informed the Court that actually the notice of appeal, the designation of record, was filed in this cause at 10:00 a. m. on Tuesday, February 27, 1951. By that act of filing and recording, this Court was ousted, as the Court feels, of jurisdiction to modify this sentence.

Accordingly, in order that the record may be clear, the Court now will hold for naught its action taken allegedly vacating the judgment and commitment, and in view of the fact that the appeal has been noted to the original judgment, that judgment will now stand.

145 Is there anything else counsel want to call to my attention?

Mr. Murray: Your Honor, the judgment from which the appeal would now be taken was that entered in the first

instance, on the afternoon of February 26, which was the indeterminate sentence. That, I believe, is a void judgment and at some time or other it ought to be corrected.

I believe it would be in order for the Court of Appeals to be requested to remand the case to this Court for the purpose of vacating that entry of judgment and awarding a sentence not containing a minimum and maximum provision; in other words, not under the indeterminate sentence law.

The Court: Well, how do you counsel propose to do it? Do you want to work it out between youselves?

Mr. Murray: I will move for the immediate remand so the record can be corrected in that particular. Then, of course, it can go back to the Court of Appeals.

The Court: What is your pleasure?

Mr. Rosenberg: I simply want to protect whatever rights I have, of course, and in view of the fact I have a short time to file a notice of appeal from the second judgment, if there is a second judgment—does Your Honor propose to vacate that second judgment?

The Court: Let me ask you this: We need the presence of the defendant to impose the sentence; I assume
146 he has gone back to Pittsburgh?

Mr. Rosenberg: He has gone back to Pittsburgh.

The Court: When do you expect he will be back?

Mr. Rosenberg: I made no arrangement because he is out on bail. Another thing, I want to protect his freedom on bail.

The Court: There is no question of that, he won't be committed or anything of the sort.

Mr. Rosenberg: At the convenience of the Court, I can have him back here.

The Court: I can make this suggestion, if you feel it is one of expediency, the action of the Court now will be to hold for naught the action taken yesterday on February 27, 1951, so that your appeal is from the prior judgment which was entered.

Now, in the meantime, if you counsel want to get together and ask for a remand and a correction, I will be very happy to accommodate you.

Mr. Murray: I will ask for it. I don't know if Mr. Rosenberg wants to indicate his attitude; whatever it is, I am going to ask for immediate remand.

The Court: So no rights will be lost, I will set aside the action taken yesterday. Have you a suitable order prepared to correct the record?

Mr. Murray: I do not have the record, Your Honor. Mr. Hull discussed the matter with me and has
147 drafted one which I think is satisfactory. I can have it sent down to Your Honor or bring it.

The Court: Has Mr. Rosenberg seen it?

Mr. Murray: No, I don't have it with me now.

Mr. Rosenberg: One other point, Your Honor: I am quite uncertain as to what is going to happen with this particular problem.

The Court: I don't think it is any kind of problem. So far as the Court is concerned, if we had had a little more time and not moved so quickly for the sentence, the sentence would have been in better order, but you moved immediately and it was given. The Court is accustomed to imposing so many felony sentences, it fell into the habit of doing it for a misdemeanor.

Your problem is that under this sentence imposed of four to twelve months, the defendant gets a break. Technically, he wouldn't be eligible for consideration of parole until he had served six or seven months, and the likelihood is he would have to serve ten months. With an indeterminate sentence, there is an indication to the authorities the minimum should be four and the maximum twelve; the likelihood of making parole is greater. It is technically a void sentence because the law of the District of Columbia does not require that indeterminate sentences be imposed. It is as broad as it is long.

148 Mr. Rosenberg: I am thinking, Your Honor, of the reduction in the fine from $1,000 to $500.

The Court: If that becomes an element after the major point in the appeal is perfected, the Court of Appeals will remand the case to the Court to correct the sentence, or do what the Court sees fit and proper, so it is no problem; we won't even worry about it.

Mr. Rosenberg: I simply want to preserve what rights I have.

The Court: I understand. Very well. Then, in order that we will be crystal-clear, I am going to sign an order that will vacate the action taken yesterday, Tuesday, February 27, 1951, and that will allow the present pending appeal to be from the original judgment imposed on Monday, February 26, 1951. In the meantime, if counsel care to, they may ask the Court to remand it for correction so the record will be complete, or otherwise let the case go up on appeal in its present form and we will be guided by what occurs when the case gets to the Court of Appeals.

Mr. Murray: May I ask Mr. Rosenberg whether the record on appeal, as it was taken at 10:00 o'clock yesterday, omits the proceedings of yesterday afternoon?

Mr. Rosenberg: Whether it now stands that way?

Mr. Murray: Yes.

Mr. Rosenberg: It does now stand that way and it
149 seems to me, if we are going to the Court of Appeals on remand, we ought to include yesterday's transcript.

The Court: The point I would like to make with counsel is this: it never occurred to the Court that the advocate would note an appeal until the action on the motion for a new trial and the motion in arrest of judgment was acted upon. It did not occur to me, regardless of what I may have said.

Mr. Murray: Regardless of Mr. Rosenberg's duties in regard to his client, he is faced with the factual situation

that it was his own motion that hurried the Court into the action it took, and I believe that ought to be considered.

The Court: You gentlemen work it out and, so far as acting upon the motion for a new trial and the motion to arrest judgment which occurred at approximately 2 o'clock in the afternoon, when the appeal had been noted at 10 o'clock in the morning, I think counsel on both sides will recall that when the Court directed Mr. Scribner on Monday to do it formally, the Court had indicated then that it would certainly overrule it. So, it was a pro forma matter when the Court overruled the motion for a new trial and arrest of judgment at 2 o'clock. I think counsel for the defense would have been startled, had I taken any other action.

Mr. Rosenberg: You are quite right.

Mr. Murray: I may say to Your Honor, I propose in my motion to the Court of Appeals for a remand to
150 take a position that all proceedings in the case subsequent to the verdict of February 26, the finding of guilty of that date, are void.

The Court: Mr. Rosenberg, if you can consent to the form of the motion, you won't have to come back and sign it when it is received.

Mr. Rosenberg: I want to discuss this with Mr. Scribner and I will as quickly as possible.

Mr. Hull: May I say a word, Your Honor? In as much as what you have said has meant to my mind you disposed of the motion for a new trial and the motion for arrest of judgment as of Monday, should the certificate of the Clerk show disposition as of that time, which would be prior to the notice of appeal?

The Court: Technically, no, because the effort was made to do it informally and I asked that a formal motion be made, and the motion has been filed and was acted upon after the notice of appeal had been noted.

The only problem is that counsel, I think, knew in advance what the action of the Court was going to be.

Mr. Rosenberg: That is right, Your Honor.

The Court: It would have been a happier thing to have acted on all motions and then have noted the appeal, which I assumed.

Mr. Rosenberg: In my knowledge of civil cases,
151 the motion for a new trial, pending prior to judgment, is impliedly overruled by the judgment.

The Court: That doesn't necessarily follow. In criminal practice, one of the very fine functions of a motion for a new trial is to draw the Court's attention to alleged errors below so the Trial Court can correct them, if the Court sees fit. Your own motion was very skimpy. It was two lines and did not set forth in detail the grounds at all.

Mr. Murray: Your Honor, the record from which the appeal was taken consists of the trial, the taking of evidence, the finding of guilty, the imposition of sentence, and the appeal. Any further proceedings are no part of the record, and I understand it, and therefore the motion for a new trial and the motion in arrest of judgment ought not to be inserted as a part of the record, I understand Your Honor is directing the Clerk.

The Court: In the hurry with which it was carried out, perhaps, the advocate has not been technically taking steps progressively, but in order that the Court of Appeals may have all formal matters of record, I will direct the Clerk to include the motion for a new trial plus a motion for arrest of judgment on which we acted at 2 o'clock on Tuesday, February 27, 1951.

Mr. Murray: I should like to state of record that the government opposes that.

152 The Court: Very well.

Mr. Murray: I don't believe counsel here should have the benefit of inserting in the record, after it happened, that which he wished to take advantage of and to omit from the record that which might harm him. I think he is inconsistent and ought not to be acceded to in that request.

The Court: Well, the matter has been gone into here. I think the record is complete and I merely want to guide the Clerk in the action and that is why I announced the order I did.

(Thereupon, the foregoing proceedings were concluded.)

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152-B Washington, D. C.,

Friday, May 18, 1951.

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152-C PROCEEDINGS

The Court: Gentlemen, there is before the Court this morning Criminal Case No. 1744-50, entitled United States v. Thomas Quinn. Is the prisoner at the bar?

Mr. Rosenberg: He is here, sir.

The Court: At this time the Court will hold for naught and void and vacate the sentence heretofore imposed in preparation for imposing a new sentence.

Is there any information or are there any additional facts which counsel or the defendant desire to call to the Court's attention before sentence is imposed?

Mr. Scribner: Just a word or two, if it please the Court. I won't take long.

The Court: Yes.

Mr. Scribner: I am sure I do not have to call this to the attention of the Court, but counsel very often errs in stating to the Court what the Court usually already knows.

In this matter Your Honor will recall that after the defendant was convicted in this Court Thomas J. Fitzpatrick, another defendant in another case, whose assertion was adopted by this defendant, was himself acquitted by Judge Morris in this district. I am sure Your Honor knows about that. I thought that might enter into your own judgment in the imposition of sentence.

I would also like to urge this Court, on the basis 152-D of the facts that are already before this Court, to

suspend the sentence of the defendant. I am not going to go into all the reasons for it. I think we have indicated them heretofore.

The Court: The Court has in mind the situation that counsel alluded to, and at this time the Court has before it a three-page single-spaced, typewritten presentence report on the defendant, Thomas Quinn.

Will you rise, please?

(The defendant stood.)

The Court: May I ask you, sir, Is there anything that you wanted to call to the attention of the Court before sentence is imposed?

The Defendant: No, Your Honor.

The Court: In Criminal Case No. 1744-50, wherein the Court found you guilty of a violation of Section 192, Title II, United States Code, the Court at this time will sentence you to imprisonment in a common jail for a period of six months and to pay a fine of $500 and that you stand committed until the fine is paid.

The Court: I believe that you are going to note an appeal, Mr. Scribner?

Mr. Scribner: Yes, we are.

The Court: A bond has been given which is satisfactory and the defendant may be released on that bond pending appeal.

(The instant hearing was concluded.)

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Excerpts from Transcript of January 19, 1951

(Emspak Case)

533 Mr. Scribner: If I might be permitted to make a suggestion, my own inclination would be at this time to make as an offer of proof the information con-
534 tained in my affidavit attached to the cases of Emspak, Matles, Fitzpatrick, Panzino, Raley, Tice, and

Quinn. They are identical affidavits. Now, I imagine that the other parties here might go along on that as an offer of proof for all of them.

The Court: Can you be a little more specific on that proof? I might tell you, Mr. Scribner, in the early days when I first came to the bar, there was a prohibition against the Government employees serving on either petit or grand juries, then there was an Act of Congress which was passed later and we are in that situation as also clarified, or whatever the expression might be, by the opinions which have recently come out of the Supreme Court. I read your affidavit very carefully in those matters. As I went through, I was looking for the thing I am now asking counsel to do, if you can make me a proffer of proof to show actual bias on the part of any of these Government employees serving on the Grand Jury.

Mr. Scribner: I would start my answer by saying—

The Court: In the old days, we used to challenge the array, if that was so, then we would have an individual poll.

Mr. Scribner: As I understand the term, actual bias has been accepted by the Supreme Court in both the Dennis and Frazier cases as that stated in the Wood case, where the Court in the Wood case said very specifically that they consider actual bias to be a constructive bias and if that can be proven, they will consider that to be actual
535 bias. As a matter of fact, they used the term "actual bias" in quotes, if Your Honor will recall. In support of that, while I would like to prepare for Your Honor a detailed and considered offer of proof, I would like to tell you generally now what it is we would offer to prove:

First, that there are ten Government employees on the Grand Jury which returned the indictments in these cases.

Secondly, that there are two additional members of the Grand Jury which returned these indictments, whose hus-

bands were Government employees at the time they were sitting on the Grand Jury.

Three, that all of these Government employees were affected by the miasma of fear, using the words of the Supreme Court in the Dennis case, and I will be a little more specific about that in a moment.

Mr. Forer: And also the wives.

Mr. Scribner: And the wives. This fear was engendered by the application of the loyalty order, the cases involved in the loyalty order, the investigations by the Federal Bureau of Investigation in respect to Government employees, and these Government employees specifically because we will show that every single Government employee was investigated for his loyalty by the F.B.I., by the investigations of the House UnAmerican Activities Committee, and by all other similar threats of investigations or actual investigations by other agencies of Government, all of which go to the question of the fear which these Government employees sitting on this Grand Jury could be reasonably expected to have in considering a case, or a series of cases, which in one way or another affect, at least in the mind of the prosecution or as it was presented to the Grand Jury, the question of Communist activities or associations.

536

The Court: Very well.

Mr. Scribner: Now, I would like to ask leave of Your Honor to submit a specific offer of proof which will put this down on paper. I can do that very shortly.

The Court: We have an official reporter and it will be a matter of argument.

Mr. Scribner: To make certain, the offer of proof is essentially what appears in my two affidavits in the cases as I have already specifically mentioned.

The Court: The Court will note the proffer.

Now, Mr. Wright.

Mr. Forer: Your Honor please—

The Court: Mr. Forer.

Mr. Forer: Is that offer accepted on behalf of all, Your Honor?

The Court: That is what I announced, with no declining of it, it will be received as an offer.

Mr. Wright: Your Honor, with the assistance of
537 Mr. Scribner and our position having been made clear, I have pointed out the law I feel is applicable, the evidence offered at the proper time, if Your Honor will grant us a hearing consistent with our motion for a hearing on that question, I think that covers my part of the argument. I therefore respectfully urge that the indictment be dismissed because of the illegal constitution of the Grand Jury; secondly, or in the alternative, that a proper hearing be granted pursuant to Rule 12 that evidence may be produced in court to show actual bias did exist, therefore the indictment was illegally returned.

* * * * * * * * * *

Counsel for Government, Mr. Hitz

604 Now, there was a question actual bias was disclosed. We do not have that here and we had the Dennis case holding that implied bias cannot be found in Government employment. The argument that was made by the defense counsel this morning with reference to the make-up of the grand jury had to do with facts the Government concedes, and they are this—the only one we concede is this: that there were 20 grand jurors who voted for the indictment in all but one of these cases, of them 10 were Government employees and 10 were not. We concede that to be true and that was stated in argument by one of counsel this morning. That same counsel went on to say that in addition to the 10 Government employees who voted for the indictment, I say all 20 did, but 10 were Government employees, there were two who had wives who were Government employees.

[fol. 162] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,081

THOMAS QUINN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before Stephens, Chief Judge, Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy, and Washington, Circuit Judges, in Chambers

ORDER—Filed March 26, 1952

It is Ordered by the Court sua sponte that the above-entitled case be, and it is hereby, set for rehearing in banc on such date as the business of the Court will permit.

Per Curiam.

[File endorsement omitted.]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11081

THOMAS QUINN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 19, 1952

Mr. David Scribner, pro hac vice, by special leave of Court, with whom *Mr. Allan R. Rosenberg* was on the brief, for appellant.

Mr. Charles B. Murray, Assistant United States Attorney at the time of argument, with whom *Mr. Charles M. Irelan*, United States Attorney, and *Mr. Joseph M. Howard*, Assistant United States Attorney, were on the brief, for appellee. *Mr. George Morris Fay*, United States Attorney when the record was filed, also entered his appearance on behalf of appellee.

Before STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, PROCTOR, BAZELON, FAHY and WASHINGTON, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant was indicted for refusing to answer a question asked by a subcommittee of the Committee on Un-American Activities of the House of Representatives. The question was whether he was or ever had been a member of the Communist Party. He was tried by a judge of the District Court without a jury and was convicted.

When appellant was asked the crucial question before the subcommittee, the following colloquy occurred:

"Mr. Quinn. I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.

"Mr. Wood. And for those reasons you decline to answer the question?

"Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the position taken by Brother Fitzpatrick yesterday.

"Mr. Wood. Did you hear his statement yesterday?

"Mr. Quinn. Yes; I did.

"Mr. Wood. Do you support it in its entirety?

"Mr. Quinn. In its entirety.

"Mr. Wood. Is there anything else you want to add to it?

"Mr. Quinn. No; I don't.

"Mr. Wood. Will you accept it as the expression of your views, then?

"Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

". . .

"Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

"Mr. Quinn. I decline to discuss with the committee questions of that nature."

The record shows that on the day preceding that of the interrogation of appellant, the subcommittee had questioned one Thomas Fitzpatrick, who had made an extended statement.

Having been indicted for refusal to answer the question put to him, Quinn moved to dismiss the indictment upon a number of grounds. The motion was denied.[1] He was tried by a judge without a jury. His defense, so far as pertinent to the present appeal, was in three contentions.

1. Quinn says that he claimed the Fifth Amendment protection against self-incrimination. He says he did this by personally adopting the form of claim made by the prior witness, Fitzpatrick.

The trial court found as a fact that at no point did Quinn, while before the subcommittee, assert the privilege in explicit terms. The court then posed the question: "Can one claim a personal privilege against self-incrimination by reference to a position that another took?" The court said:

> "On that, this Court finds as a matter of law that one may not. Since the privilege is personal, the defendant must assert it himself, since another may not know what is in a defendant's mind at the time he is called before the Congress to testify on pertinent matters, to proper inquiry, and therefore, one may not, by reference, assert that privilege."

The trial court therefore concluded that Quinn had not asserted his personal privilege in respect to self-incrimination.

We are of opinion that a witness may claim the constitutional privilege by referring to and adopting language

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[1] United States v. Emspak, et al., 95 F.Supp. 1010 (D.C. D.C. 1951); United States v. Emspak, et al., 95 F.Supp. 1012 (D.C.D.C. 1951).

used by another, so long, of course, as that other's language is identified. On that point we think the District Court was in error, and the Government so concedes. It is true that the privilege is a personal one [2] and the circumstances must be such as to indicate that the witness himself personally asserts the claim.[3] But, when a witness personally asserts that he adopts a described expression as his expression, the claim is personally made. No formula or specific term or expression is required. The language may be the witness's own composition or may be a quotation from another or may be the adoption of another's statement; so long as the witness himself personally makes the claim, either by words or by action, this requirement is satisfied no matter what form he uses.

Then the question is whether Quinn, by adopting Fitzpatrick's statement, asserted a privilege against self-incrimination. Basically, of course, that question concerns what was in Quinn's mind. But courts cannot act upon unrevealed intentions, and so the inquiry must be whether Fitzpatrick did or did not claim the privilege. If what he said did not amount to such a claim, Quinn's adoption of the statement did not amount to one. The trial court made no ruling upon the meaning or the sufficiency of Fitzpatrick's statement.[4] Having held that

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[2] Rogers v. United States, 340 U.S. 367, 370-371, 95 L.Ed. 344, 71 S.Ct. 438 (1951).

[3] As to whether claim may properly be made by the witness's attorney, see Jones v. Commonwealth, 99 N.E.2d 456 (Sup. Jud. Ct. Mass. 1951), and cases collected in footnote 4 thereto; Musselwhite v. State, 54 So.2d 911 (Sup. Ct. Miss. 1951). *But see In re* Leiby's Estate, 101 N.E.2d 214 (Ct. App. Ohio 1951), *appeal dismissed*, 156 Ohio St. 254, 101 N.E.2d 906 (1951); annotation at 75 AM. ST. REP. 339-340.

[4] Upon his own trial Fitzpatrick was held to have claimed the privilege. United States v. Fitzpatrick, 96 F.Supp. 491 (D.C.D.C. 1951).

Quinn could not as a matter of law adopt it, the court was not called upon to consider it. In the view which we take of the case the efficacy of Fitzpatrick's statement as a claim of the privilege must be determined. The problem is whether it should be determined by this court or by the trial court.

The issue as to Fitzpatrick's statement, as we see it, is whether a reasonable auditor would understand from what Fitzpatrick said that he (Fitzpatrick) was claiming the right to refuse to answer because his answer might tend to incriminate him. The words which Fitzpatrick used are known, are in this record, and are not in dispute. What did those words mean as he uttered them?

Fitzpatrick's discussion, which was lengthy, related chiefly to First Amendment rights. He did not at any point make a clear and unequivocal statement that he claimed the privilege against self-incrimination. The closest he came to it were two references to the Fifth Amendment in the course of his long discussion of rights of free speech and thought. Once, before any questions had been asked him, he said, "This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment." And once he said, "I stand on the protection of the Constitution, the First and Fifth Amendments." There was no context indicating that a claim of the privilege was meant.

We think the words "Fifth Amendment", considered alone, do not constitute a formula which invokes the privilege against self-incrimination. The Fifth Amendment contains more than one clause. It contains two which are possibly pertinent here, the privilege against self-incrimination and the due process clause. The expression "I claim the protection of the First Amendment, supplemented by the Fifth" may well and reasonably mean "I claim the protection of the First Amendment to my rights of free speech and thought, supplemented by the guarantee of due process of law." The combination of

First and Fourteenth Amendment protection is not unusual,[5] and the combined reference has the meaning just expressed. Of course, as a matter of constitutional law, a reference to the Fourteenth Amendment as supplementing the First is a reference to the due process clause as a vehicle for applying the First Amendment restrictions to the states, and in that sense reference to the Fifth Amendment as supplementing the First has no meaning in a controversy over federal action. But we are considering an expression used by a lay witness, and familiarity with the combined phrase "First and Fourteenth" may account for the use of the phrase "First and Fifth" to indicate the full force of the First Amendment protections.

In our opinion the question here is whether Fitzpatrick's statement, in full text and context, related only to the claim of the rights of free speech and thought under the First Amendment, or whether an auditor could detect an intention to claim the privilege against self-incrimination, protected by the Fifth Amendment.

Words do not always have indisputable meanings. When they do not, their interpretation is a matter of law in some instances and a matter of fact in others. If an ambiguous phrase appears in a statute, its meaning is a question of law. If one occurs in a contract, its meaning depends upon the intention of the parties; and that may be an unalloyed question of fact. If the dispute concerns the meaning of the whole of a lengthy recital by a witness on the stand, the meaning is a question of fact.

Whether Fitzpatrick's meaning is a question of fact or a mixed question of law and fact is close to the borderline. Our opinion is that, in either event, the conclusion ought to be drawn in the first instance by the trial

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[5] Burstyn, Inc. v. Wilson, 343 U.S. 495, 96 L.Ed. —, 72 S.Ct. 777 (1952); Niemotko v. Maryland, 340 U.S. 268, 95 L.Ed. 267, 71 S.Ct. 325 (1951). *Cf.* Gitlow v. New York, 268 U.S. 652, 666, 69 L.Ed. 1138, 45 S.Ct. 625 (1925).

court. In the setting of a criminal case (which is all we have here), we do not think that strict analysis of whether a given inquiry presents a question of law or of fact or a mixed one of law and fact is controlling as to whether it may be determined in the first instance by an appellate court, especially where that inquiry concerns the main issue in the case.[6]

Perhaps, if we were of clear opinion that Fitzpatrick, and therefore Quinn, did claim the privilege and so must be acquitted, we should dispose of the matter finally here and now. Under such circumstances we would reverse a judgment of conviction. But a majority of the court are not of that clear opinion.

The affirmance of a judgment of conviction involves some considerations different from those involved in the reversal of such a judgment. Basically, an accused can be convicted only upon a trial, and the function of an appellate court in affirming a conviction is circumscribed by that principle. A reversal may result in another trial. Generally determinations upon which a judgment of conviction finally rests ought to be made in the first instance

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[6] See Miller v. United States, 169 F.2d 865 (6th Cir. 1948), where the Court of Appeals for the Sixth Circuit reversed and remanded a criminal conviction for determination by the trial court of a question of law, and the same case on a second appeal, 173 F.2d 922 (6th Cir. 1949), where the judgment of conviction by the District Court, after only a partial new trial, was reversed and remanded for new trial *de novo*. See also Litton v. United States, 177 F.2d 416, 417 (8th Cir. 1949), *cert. denied*, 339 U.S. 921, 94 L.Ed. 1344, 70 S.Ct. 620 (1950): "This . . . is an appellate court without power or jurisdiction to retry criminal cases, our authority being limited to reviewing alleged errors of law which may have been committed by the trial court." *Compare* 62 STAT. 963 (1948), 28 U.S.C.A. § 2106, with 37 STAT. 565 (1912), as amended, 48 U.S.C.A. § 1356 (1928), repealed by Act of June 25, 1948, 62 STAT. 991. See Kemp v. Government of Canal Zone, 167 F.2d 938, 942 (5th Cir. 1948).

by the trial court, not by the appellate court. It is upon this phase of the problem presented by this appeal that members of this court differ.

The judgment of the court is that the case should be remanded to the trial court for a new trial, at which the issue, if then raised, would be whether Quinn claimed the privilege by adopting the statement made by Fitzpatrick. Either or both of two views lead us to that judgment. One view is that in a criminal case an appellate court has no authority to make the initial determination of an issue such as this one, whether it be called a question of fact or a mixed question of law and fact, upon which a judgment of conviction would rest; that an initial decision upon such an issue must be made by the trial court, if a judgment of conviction would follow. The other view is that an appellate court has some discretion in such circumstances but that in the present case the discretion should be exercised to cause a determination of the issue by the trial court, rather than to affirm a conviction upon the decision of an issue not considered by the trial court.

Two reasons are suggested why it might be appropriate, in the peculiar circumstances of this case, for this court to determine whether the privilege was in fact asserted by Fitzpatrick. The first is that trial by jury was waived and the case was tried by a judge alone. The second is that the evidence consisted primarily of a reading, by counsel for the subcommittee, of the transcript of the hearings before the subcommittee. But when a defendant waives trial by jury he does not thereby consent to a determination of his guilt or innocence by an appellate court. As to the second reason we think it is confused with the rule as to civil equity cases.[7] In those cases the trial judge makes specific findings upon the

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[7] Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950), *cert. denied*, 340 U.S. 810, 95 L.Ed. 595, 71 S.Ct. 37 (1950).

several facts and the appellate court must determine whether those findings are or are not "clearly erroneous". But no such situation exists in a criminal case. Moreover, one of the substantial rights accorded a criminal defendant by statute in the federal courts is the right of appeal. Were this court to affirm the conviction on a finding not considered below, the defendant would in effect be deprived of that right, for our finding, in the first instance, on the main issue, would be subject to review only on the grant of *certiorari* by the Supreme Court.

The Government urges that we affirm the conviction on the theory that the error of the trial court was harmless,[8] in that it could not reasonably be concluded from the evidence that Quinn, by his adoption of Fitzpatrick's statements, asserted a claim of the privilege. We think that Rule 52(a) of the Criminal Rules should not be interpreted in the circumstances of this case to require the appellate court to assume the function of considering initially the basic issue.[9]

2. Appellant's second point is that, before a witness before a congressional committee can be held in contempt for refusing to answer a question, he must be specifically directed to answer and his reasons for refusing to answer rejected or overruled. We have passed upon the point contrary to appellant's contention in No. 10943, *Emspak* v. *United States*, decided today. As was pointed out in No. 11045, *Bart* v. *United States*, also decided today, to constitute an offense refusal to answer must be intentional. It must appear that Quinn was aware of the intention of his inquirer that answers were required despite

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[8] FED. R. CRIM. P. 52(a).

[9] See Kotteakos v. United States, 328 U.S. 750, 757-777, 90 L.Ed. 1557, 66 S.Ct. 1239 (1946); Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514 (1948); Bollenbach v. United States, 326 U.S. 607, 614, 90 L.Ed. 350, 66 S.Ct. 402 (1946).

his objections. He said he adopted all of Fitzpatrick's statement. Fitzpatrick made a full statement before he was asked any questions, stating that he would refuse to answer, and before the questioning began the Chairman of the Subcommittee explained to him the necessity for answers. When Quinn himself was questioned, and after he had refused to answer, adopting Fitzpatrick's statement, the Chairman twice asked him to answer the question. The deliberate and intentional character of the refusal is an element of the offense, to be determined from all the circumstances by the trier of the facts. That issue will be before the trial court if the case is retried.

3. Appellant's third point is that, since ten members of the grand jury which indicted him were Government employees and two were wives of Government employees, he was entitled to a hearing on his motion to dismiss the indictment as void for that reason. We have also passed on this point contrary to appellant's contention in *Emspak* v. *United States, supra.*

The judgment of the District Court will be reversed and the case remanded for a new trial.

Reversed and remanded.

BAZELON, *Circuit Judge*, with whom EDGERTON, *Circuit Judge*, joins, concurring in the result: While I agree to the reversal of the conviction and the remand for a new trial, I take a differing view with respect to some important questions.

I.

The court concludes that there was no error in denying appellant a hearing for the purpose of demonstrating that Government employees were not qualified to act as grand jurors in this case. This conclusion rests on this court's view in *Emspak* v. *United States*, decided today, that appellant "did no more than assert existence of a 'miasma of fear' so clearly rejected in the *Dennis*

case."[1] I think the court misreads *Dennis* v. *United States*. Before discussing that phase of the court's opinion, however, I think it essential to consider the Government's contention that the rule of the *Dennis* case—whatever it is—applies only to a petit jury and not to a grand jury.

The Government says, "It is not free from doubt that partiality in a grand juror is *per se* disqualifying. * * * Historically, grand jurors were chosen for what they knew about affairs in the community, which in the case of a petit juror would be disqualifying."[2] "Partiality," resulting from knowledge, is one thing. But partiality resulting from fear induced by an atmosphere of intimidation, which appellant seeks to demonstrate, is quite another. In my view, the latter would be disqualifying. For "petitioner's federal constitutional right to a fair and impartial grand jury"[3] can be no less than that his indictors be free of fear that would paralyze the exercise of their free will.[4]

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[1] Emspak v. United States, — U.S. App. D.C. —, — F. 2d — (1952), slip opinion, p. 3; Dennis v. United States, 339 U.S. 162 (1950).

[2] Brief for Appellee in Emspak v. United States, p. 26. The Government concedes that while "The Fifth Amendment requires indictments only in capital 'or other infamous' crime, * * * where the Government has chosen or been compelled to proceed by indictment, the accused probably has standing to move to dismiss an indictment found by a disqualified body, just as he would have a right to attack an information filed upon the oath of a disqualified prosecuting officer." *Id.* at 26, note 3. And see Brief for Appellee in the instant case, p. 58.

[3] Cassell v. Texas, 339 U.S. 282 (1950).

[4] *See* Crowley v. United States, 194 U.S. 461, 472 (1904), where the Supreme Court quoted with approval from the "leading case" of Vanhook v. State, 12 Texas 252, 268: "The better opinion, to be deduced from the authorities, to which we have access, seems to be that irregularities in selection and impanelling the grand jury, which do not relate to the competency of individual jurors, can, in general, only be ob-

It is unconvincing to tell us, as the Government does, that the "bias" here asserted would not, if proved, disqualify a grand juror. Neither the Supreme Court nor this court has ruled on the question. Even in regard to bias arising from a direct financial interest, the state cases are in confusion and this court might well start afresh in fashioning a rule for this jurisdiction.[5] I have

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jected by a challenge to the array. But that the incompetency, or want of the requisite qualifications of the jurors, may be pleaded in abatement to the indictment. And this doctrine and distinction seems founded on principle. It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right, in the first place, to have the accusation passed upon, before he can be called upon to answer to the charge of crime, by a grand jury composed of good and lawful men. If the jury be not composed of such men as possess the requisite qualifications, he ought not to be put upon his trial upon a charge preferred by them; but should be permitted to plead their incompetency to prefer the charge and put him upon his trial, in avoidance of the indictment. Otherwise he may be compelled to answer to a criminal charge preferred by men who are infamous, or unworthy to be his accusers."

In United States v. Remington, 191 F.2d 246, 252 (2d Cir. 1951), appellant moved to quash the indictment contending "that the foreman, one Brunini, had a financial interest in a book which the government's chief witness was writing * * *." The Court of Appeals reversed for further proceedings pointing out that "[t]he indictment should not be quashed *unless undue influence is shown*" by Brunini on the other grand jurors. *Ibid.* (emphasis supplied). And *cf.* United States v. Wells, 163 Fed. 313 (D. Idaho 1908) (plea in abatement sustained—prosecuting attorney voluntarily appeared before grand jury and urged finding of indictment, stating views on law and sufficiency of evidence, etc.); *but see* United States v. Belvin, 46 Fed. 381, 384-5 (Cir.Ct.E.D. Va. 1891).

[5] State v. Richardson, 149 S.C. 121, 146 S.E. 676 (1928) (indictment returned by grand jury chosen by commissioners who deposited in defendants' bank quashable if issue raised

discovered no case—state or federal—which considers whether fear induced by an atmosphere of intimidation disqualifies a grand jury.[6]

What the Government is proposing is *pro tanto* repeal of the Fifth Amendment's assurance of "a presentment or indictment of a Grand Jury."[7] It is true that the grand jury has been criticized as an anachronistic institution. But, as the Supreme Court has said:

> "Whatever force may be given to this argument, it remains true that the grand jury is as valuable as

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in time); *see* Joslyn v. People, 67 Colo. 297, 184 Pac. 375, 377 (1919) ("direct pecuniary interest" disqualifies grand juror); *but cf.* Coblentz v. State, 164 Md. 558, 166 Atl. 45 (1933) (depositors not disqualified from voting to indict insolvent bank's president); State v. Turner, 72 N.J.L. 404, 60 Atl. 1112 (1905). State courts are also in disagreement on whether members of a grand jury which previously indicted a defendant are qualified to serve on a grand jury which reindicts him for the same offense. People v. Hansted, 135 Cal. 149, 67 Pac. 763 (1901) (not qualified—statute disqualifies if *"a state of mind* exists on his [grand juror's] part in reference to the case"—emphasis supplied); *cf.* State v. Bullard, 127 Iowa 168, 102 N.W. 1120 (1905) (statute disqualifying grand juror if he had such an opinion "as would prevent him from rendering a true verdict upon the evidence" required disqualification if grand juror "would be an unfit person to sit upon a petit jury"); *but see* State v. Wilcox, 104 N.C. 847, 10 S.E. 453, 454 (1889) (dictum—"The fact that the magistrate who committed a defendant was foreman of the [indicting grand] jury * * * not * * * good ground for motion to quash [indictment]").

[6] An atmosphere of intimidation clearly does disqualify a petit jury. Moore v. Dempsey, 261 U.S. 86, 91 (1923) (domination of trial by mob violence in courtroom); Frank v. Mangum, 237 U.S. 309, 335 (1915) (hostile public sentiment and mob domination of the courtroom).

[7] Prosecution for violation of 11 STAT. 155 (1857), as amended, 52 STAT. 942 (1938) 2 U.S.C. § 192 (1946) need not, of course, be commenced by grand jury action. But see note 2, *supra*.

> ever in securing * * * 'individual citizens' 'from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury; and 'in case of high offences' it 'is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions.'" [8]

The grand jury "is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." [9] The grand jury system derives from the notion "that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." [10]

An ordinary citizen has slight protection from the activities of a grand jury. For example, he may be indicted without the benefit of a preliminary hearing before a committing magistrate,[11] and even though he has had no opportunity to appear on his own behalf.[12] As a witness, he must answer the questions of a grand jury which may be proceeding under an unconstitutional statute,[13] and questions which he thinks are not relevant to the

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[8] *Ex parte* Bain, 121 U.S. 1, 12 (1887), quoting Chief Justice Shaw of Massachusetts in Jones v. Robbins, 8 Gray 329.

[9] *Ex parte* Bain, *supra*, p. 11, quoting Justice Field in 2 Sawyer 667.

[10] Beavers v. Henkel, 194 U.S. 73, 84 (1904).

[11] United States v. Gray, 87 F.Supp. 436 (D.D.C. 1949).

[12] United States v. Thompson, 144 F.2d 604, 605-6 (2d Cir. 1944); Hale v. Henkel, 201 U.S. 43, 65-6 (1906).

[13] *Cf.* Blair v. United States, 250 U.S. 273 (1919).

subject of the grand jury's inquiry.[14] Delegation of such sweeping powers compels a balancing caution in the selection of those who exercise them. Freedom of will and conscience should be a minimal requisite in their selection.

Preservation of the integrity of the grand jury system is not merely a matter of individual concern. It touches our democratic insistence on the fair administration of law. When the grand jury is not properly constituted, "reversible error does not depend on a showing of prejudice in an individual case * * *. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[15] For that reason, the Supreme Court has long included the grand jury within the scope of the Fourteenth Amendment's equal protection clause,[16] even in the absence of prejudice to an individual defendant.[17] It would be highly anamolous, then, to hold

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[14] *See id.* at 282: United States v. McGovern, 60 F.2d 880, 888-9 (2d Cir. 1932), *cert. denied*, 287 U.S. 650, and cases therein cited.

Legislation has been introduced in the Senate "to authorize * * * the appointment of special counsel and investigators to assist grand juries in the exercise of their powers." S. 2086, 82d Cong., 1st Sess. (1951).

[15] Ballard v. United States, 329 U.S. 187, 195 (1946).

[16] The Fourteenth Amendment, however, does not require a state to proceed by way of indictment or presentment, even in a first-degree murder case. Hurtado v. California, 110 U.S. 516 (1884). In about half the states and in England use of the grand jury as an investigative body and of indictment as a step in prosecution has been largely abandoned. DESSION, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 857 (1948).

[17] This development is summarized, and protested, in the dissenting opinion of Mr. Justice Jackson in Cassell v. Texas, 339 U.S. 282, 298 (1950).

that neither the grand jury clause nor the due process clause of the Fifth Amendment affords a defendant any protection in the presence of the prejudice of an intimidated grand jury.

I turn now to the court's application of the *Dennis* case. Like *Dennis*, the present case is one "inherently touching the security of the Government, at a time when public feeling on these matters is notoriously running high * * *."[18] Of the twenty members of the grand jury which voted the present indictment, ten were Government employees and two others were wives of Government employees. By timely motion to dismiss (together with supporting affidavits) or, in the alternative, to grant a hearing in the matter, appellant called the court's attention to the existence of both known and alleged circumstances from which it was charged that Government employees could not be suitable jurors in this particular case. If they could not, then the indicting grand jury was illegally constituted and its indictment void since there were less than twelve qualified grand jurors.[19]

In denying appellant's motion and striking appellant's supplemental affidavit[20] "for the reason that it is legally insufficient," the court said:

> "In the absence of a showing of actual bias on the part of the members of the Grand Jury due to their employment in the Government of the United States

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[18] Mr. Justice Frankfurter dissenting in Dennis v. United States, 339 U.S. 162, 183 (1950).

[19] FED.R.CRIM.P. 6(b)(2). See also note 2, *supra*.

[20] Appellant submitted an affidavit, J.A., pp. 15-17, and a supplemental affidavit, *id.* at 33-45. There is no notation in the record that the first affidavit was struck, but presumably the trial judge's action on the supplemental affidavit applied to the first affidavit as well.

> or the Government of the District of Columbia, the indictment is not void. *United States* v. *Wood*, (1936) 299 U.S. 123; *Frazier* v. *United States*, (1948) 335 U.S. 497; *Dennis* v. *United States*, (1950) 339 U.S. 162. In a particular case Government employees serving as Grand or Petit Jurors might be barred for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors. No such circumstances are present under the force of the present motion to dismiss, nor were any such circumstances indicated in defendant's proffer of proof in support of the motion for a hearing on the qualifications of the Grand Jurors." [21]

This court, like the trial court, relies on the line of cases culminating in *Dennis* v. *United States* as a basis for the denial of a hearing on bias. Because I think this court misreads *Dennis*,[22] I cannot accept the conclusions built upon it.

When the *Dennis* case was called for trial, the accused moved for a transfer to another district on the ground that prejudice against him in the District of Columbia would prevent a fair trial.[23] He also challenged for cause all Government employees called to serve as petit jurors.[24] A short affidavit, presented in support of the transfer motion, asserted: (1) that the effect of Executive Order 9835, known as the Loyalty Order, would bar a fair trial; (2) that the possibility of the House Committee on Un-American Activities taking note of anyone voting for acquittal would prevent a verdict of "not guilty"; and (3) that false rumors spread by the Washington press had discredited Dennis and prejudiced his right to a

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[21] J.A., p. 65.

[22] *See* Morford v. United States, 339 U.S. 258 (1950).

[23] Transcript of Record, p. 27, Dennis v. United States, 339 U.S. 162 (1950).

[24] *Id.* at 64-5.

fair trial.[25] Although the Dennis brief in the Supreme Court contained lengthy discussions seeking to establish a "miasma of fear" which affected all Government employees, the record contained nothing but the affidavit with the assertions just described. The record also disclosed that no hearing was requested or proffer of proof made in connection with the issue of prejudice. In fact, counsel for Dennis expressly stated that he could "add nothing to the affidavit."[26] The motion for transfer and the challenges for cause to the jury on voir dire were denied. And it was the latter action that was sustained by the majority of the Supreme Court.

In the present case, however, counsel by extensive affidavits, request for hearing, and proffer of proof sought to develop and prove for the record certain circumstances bearing on the issue of bias. His attempt to show the impact of the loyalty and security programs on Government employees[27] differed materially from the showing in the *Dennis* case. There the Supreme Court carefully pointed out:

> "* * * the Loyalty Order preceded the instant trial only by about three months. It was promulgated by the President on March 21, 1947. This trial began on June 23, 1947, and was concluded on June 26, 1947. On May 9, 1947, the President submitted to Congress a request for an appropriation to carry out the Loyalty Order, which was not enacted into law until July 31, 1947. It was not until August 18, 1947, that Standard Form 84, requesting certain pertinent information from each federal employee, was made available.
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> "The administrative implementation of Executive Order 9835, which was yet to come, was apparently

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[25] The affidavit appears in *id.* at 27-32.

[26] *Id.* at 11.

[27] For an interesting discussion of this problem, *see* Jahoda & Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 YALE L. J. 295 (1952).

not the subject of anticipatory fear by these jurors." [28]

In marked contrast, the indictment in the present case was returned in November of 1950, by which time the Loyalty Order had been in full operation for more than three years. The affidavits in support of appellant's motion contain a recital of some generally known events and procedures, and allegations as to others, relating to the operation of that Order.

Moreover, instead of the argument in the *Dennis* brief in the Supreme Court that the Un-American Activities Committee had given lists of federal employees to the Attorney General,[29] the present record contains an affidavit referring, *inter alia*, to the temper of congressional criticism of the outcome of the first *Hiss* trial and the admission of Harry Bridges to bail. That criticism was directed against judges who enjoy the constitutional immunity of life tenure.[30] On that basis, appellant sought to show that it would not be "farfetched and chimerical" [31] to suppose that the challenged Government employees, who have no such immunity, might have feared the consequences of a similar attack following a refusal to indict.

There would be no point to a more detailed comparison of the record in this case with that in *Dennis*. It suffices that appellant's affidavits went considerably beyond *Dennis* in attempting to demonstrate that "Government employees • • • have been the subject of an active campaign to determine whether they are in any way sympathetic or tolerant to 'Communism' or 'Communists,' or sympathetic to any person who in turn is associated with 'Communism' or 'Communists' or with organizations which have been

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[28] 339 U.S. 162, 169-70 (1950).

[29] Brief for Petitioner, pp. 33-4, Dennis v. United States, 339 U.S. 162 (1950).

[30] J.A., p. 37.

[31] United States v. Wood, 299 U.S. 123, 150 (1936).

called 'Communist Fronts' or with persons who may have been called 'Communist fellow travelers.'" [32]

Resolution of the disqualification issue does not depend upon whether the loyalty program or investigations by Congress have exceeded lawful bounds. No such question is before us. It depends instead upon whether these activities prevent Government employees from exercising the free will essential to the impartiality required for their service as grand jurors in this case. "The problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two." [33]

Despite the differences between *Dennis* and the instant case, the Government argues that an attack on the qualifications of grand jurors must be "based on facts and not mere conclusions." The Government further asserts, without citing any authority, that unless appellant can advance a reason for "not making his whole showing in the usual form of affidavits * * *" the trial judge can properly deny a hearing.[34] This position rests on a misconception of the nature of the proof required to disqualify a Government employee, and on a failure to make allowance for the difficulties inherent in establish-

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[32] J.A., pp. 34-6.

[33] Concurring opinion of Mr. Justice Douglas, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951).

[34] Rule 12(b)(4) of the FEDERAL RULES OF CRIMINAL PROCEDURE reads:

> "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

ing a state of mind[35] in the circumstances of this case.

It is well understood that a trial judge has wide latitude in disposing of objections to the qualifications of the grand jury. Where the grounds advanced in support of a motion to quash an indictment are clearly insufficient in law, a hearing would be without purpose. This was the situation in *United States* v. *Rintelen*,[36] relied upon by the Government. In that case, a plea in abatement simply charged that the "grand jurors [in finding the said indictment] were actuated by a strong temper and prejudice against the defendants as the result of false statements and vicious newspaper publications."[37] The court held that these were not allegations of ultimate fact. But the affidavits in the present case are markedly different both in their nature and specificity. Here they seek to show that in the prosecution of an alleged Communist, independent judgment cannot now be expected of Government employees because, as the President's Committee on Civil Rights said in 1947, "The freedom of opinion and expression enjoyed by these people is in many ways dependent upon the attitudes and practices of the government."[38] This charge of intimidation as a consequence, however unintended, of the loyalty and security situation,[39] is the crux of the distinction between the two cases.

A motion to quash an indictment should not, of course, be granted merely on legally sufficient allegations. The movant cannot insist that his allegations stand admitted

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[35] See Jahoda & Cook, *supra*, note 27, at 305 *et seq.*, for the possible effects of the climate of thought on a state of mind.

[36] 235 Fed. 787 (S.D.N.Y. 1916).

[37] *Id.* at 788.

[38] To Secure these Rights: The Report of the President's Committee on Civil Rights, 1947, p. 101, quoted in J.A., p. 39.

[39] See Jahoda & Cook, *supra*, note 27, at 298.

in the absence of a denial.[40] Nor would I suppose that a trial judge must grant a hearing when it clearly appears that the factual basis on which the movant relies is frivolous. But where it appears from affidavits in support of legally sufficient allegations that their factual basis is not clearly frivolous and the movant seeks a hearing to prove them, it is reversible error to cut him short.[41]

Since appellant's legally sufficient allegations were supported by affidavits of circumstances which cannot be said to be frivolous, the foregoing principles required that his request for a hearing be granted in this case. It may well be that appellant will be unable to prove his allegations or to show such facts as would result in his securing the relief which he seeks. His burden of proof will undoubtedly be great. We might be unwilling to accept the sort of proof he may offer. But I cannot bring myself to concur in a view which forecloses all opportunity of showing the extent to which basic rights may have been infringed.[42] I could reach a contrary result only by adopting the premise that the partiality of a class of persons cannot in any case be attributed to an individual. But I think the Supreme Court precluded this premise by its assurance in *Dennis*, precisely with respect to Government employees as a class, that "[t]he way is open in every [such] case to raise a contention of bias from the realm of speculation to the realm of fact."[43]

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[40] Martin v. Texas, 200 U.S. 316, 319-20 (1906); Brownfield v. South Carolina, 189 U.S. 426 (1903); Smith v. Mississippi, 162 U.S. 592 (1896); *see* Glasser v. United States, 315 U.S. 60, 87 (1942).

[41] Carter v. Texas, 177 U.S. 442 (1900); see also cases cited in note 40, *supra*.

[42] *Cf.* dissenting opinion, Johnson v. Matthews, 86 U.S. App.D.C. 376, 383, 182 F.2d 677, 684, *cert. denied*, 340 U.S. 828 (1950).

[43] 339 U.S. 162, 168 (1950).

The difficulty with the subject generally seems to result from lack of clarity as to the substantive grounds for disqualification. This lack of clarity appears in the trial court's statement on the one hand that "Government employees * * * might be barred for implied bias" [44] and on the other hand that appellant was required "to show actual bias." [45] The distinction between the concepts of "actual bias" and "implied bias" is a problem in semantics arising from their chameleon-like quality.[46] But whether we use one term or the other, in their context here I think they necessarily mean a "state of mind" (not a technical conception)[47] which can reasonably be expected to follow from the "circumstances * * * properly brought to the court's attention." [48] It was the trial court's apparent failure to bring the substantive grounds for disqualification into sharp focus which blurred the issue relating to the applicable criteria for hearing and proof.

"For the ascertainment of this [disqualifying] mental attitude * * *, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." [49] The procedure which the appellant

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[44] J.A., p. 65.

[45] *Id.* at 159. And both positions were taken in the trial judge's memorandum opinion quoted *supra*.

[46] "In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him." United States v. Wood, 299 U.S. 123, 134 (1936).

[47] *Id.* at 145-6.

[48] Dennis v. United States, 339 U.S. 162, 173 (1950) (concurring opinion of Mr. Justice Reed).

[49] United States v. Wood, 299 U.S. 123, 145-6 (1936). This language was quoted with approval in Frazier v. United States, 335 U.S. 497, 511 (1948).

adopted in this case was to ask that "a proper hearing be granted * * * that evidence may be produced in court to show actual bias did exist."[50] I would reverse the conviction and remand for a new trial because I think the trial court abused its discretion in denying appellant that hearing.

II.

The view I take of another question might dispose of the entire case upon retrial. Appellant contends, in substance, that a charge of contempt cannot lie since he was not "specifically directed to answer * * * and his reasons for refusing to answer * * * were not rejected or overruled."[51] The nub of the problem rests upon the meaning of the key phrase "refuses to answer" in § 192. That section of the contempt statute provides in pertinent part:

> "Every person who * * * summoned as a witness by the authority of either House of Congress to give testimony * * * before * * * any committee of either House of Congress, wilfully makes default, or who, having appeared, *refuses to answer* any question pertinent to the * * * inquiry, shall be * * * guilty of a misdemeanor, punishable by a fine * * * and imprisonment in a common jail for not less than one month nor more than twelve months."[52]

This problem is discussed in the opinion of the court in *Bart* v. *United States*, decided today.[53] There the court establishes this basic principle: "If a witness interposes an objection or query to the propriety of a question, *e.g.*, its pertinency, he may not be refusing to answer. In such event both elementary justice and statutory provision require that he be made aware, by some

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[50] J.A., p. 161.

[51] Brief for Appellant, Statement of Questions Presented.

[52] 11 STAT. 155 (1857), as amended, 52 STAT. 942 (1938), 2 U.S.C. § 192 (1946) (emphasis supplied).

[53] — U.S.App.D.C. —, — F.2d — (1952).

method *at some time,* that despite his position the inquirer means that he shall answer the question."[54] Although there is no talismanic formula which the Committee must use in directing the witness to answer, I would state the principle this way: It must appear from all the circumstances that (1) the witness was clearly apprised, and not left to the risk of guessing upon pain of criminal penalties, whether the grounds for his objection to answering were accepted or rejected, and that (2) if rejected, he was given another opportunity to answer. Under this view the Committee would necessarily have to inform the witness *in time* to allow opportunity for answering. I think it implicit in *Bart* that the ruling must be that of the inquiring authority (the Committee here).[55] The court there says that "[i]f the actual questioner be counsel instead of the inquiring authority, or a member of it, the attitude * * * of that authority may be made clear by prior announcement or by acquiescence or ratification. That phase of the matter must be determined from the circumstances."[56] I take this to mean that it must clearly appear to a reasonable person in the position of the witness that the ruling is, in fact, that of the inquiring authority or its duly authorized presiding member acting on its behalf.[57]

A conclusive presumption of intent to violate the statute might attach to a naked refusal to answer, *i.e.*, a refusal without a statement, at the time, of the reason therefor.[58] But the court in *Bart* defines naked refusal

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[54] Bart v. United States, slip opinion, pp. 5-6 (emphasis supplied).

[55] See, *e.g.* 98 Cong.Rec. 8686 (June 30, 1952) where the Committee directs the witness upon the request of Committee counsel.

[56] *See* Bart v. United States, p. 6.

[57] *See* United States v. Kamp, 102 F.Supp. 757, 759 (D.D.C. 1952), discussed *infra*.

[58] *See* United States v. Bryan, 339 U.S. 323, 332-3 (1950).

as a refusal "without asserted legal justification."[59] If this means merely that an actual legal principle must be invoked to justify a refusal to answer, I agree. But if the court's opinion in *Bart* implies that the principle invoked must in fact be applicable to the circumstances of the particular case,[60] I disagree. The latter interpretation, by abolishing the distinction between the assertion of a claim, on the one hand, and its validity or appplicability, on the other, would sap all substance from the basic principle enunciated by the court.

It is only after an intent to refuse has been established in accordance with the foregoing principles that the witness is "bound rightly to construe the statute."[61] And since, except for naked refusals, intent cannot be imputed to the accused as a matter of law, it must be determined as a question of fact, from all the circumstances, as an essential element of the crime. Before the court can consider the validity of any grounds, not plainly frivolous, for objecting to answer, intent to refuse must be thus determined.[62]

The foregoing construction of the key phrase "refuses to answer" is clearly indicated by an examination of the legislative history and of the cases decided under this statute.

In 1857 Congress enacted the contempt statute to supplement its inherent powers.[63] Congressman Davis,

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[59] Slip opinion, p. 3.

[60] *Ibid.*

[61] Sinclair v. United States, 279 U.S. 263, 299 (1929), discussed *infra*.

[62] For the reasons I expressed in Bart, I think the court cannot reach the question of the validity of the claim of the privilege against self-incrimination until it has been determined that the Committee clearly apprised the witness that it had rejected his claim.

[63] 11 STAT. 155 (1857). See generally CONG. GLOBE, 34th Cong., 3d Sess. 403 *et seq.* (1857). *And see* In re Chapman, 166 U.S. 661, 672 (1897).

speaking for the proposing committee, said of the first section, which in all significant respects is identical with § 192:[64] "[I]t increases no power now existing in any committee, and *confers* no power to be exercised either by the committee or the House. • • • I presume, therefore, that it does not *inflict* any burden on the citizen; that it throws guards around him."[65] It becomes pertinent therefore to determine the rights which committees then afforded the witness during a hearing. At that time, the witness had the safeguards of the following procedure: The committee ruled on his objections, and, if adversely, provided at least one other opportunity to answer. Only then was the witness haled before the bar of the Senate or House to show cause why he should not be held in contempt for refusing to answer. The procedure of an 1857 House Committee investigating corruption illustrates the safeguards which Congress intended to preserve, not alter,[66] by this statute. Because the Committee believed

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[64] 11 STAT. 155 (1857), unchanged so far as is relevant here, as amended, 52 STAT. 942 (1938), 2 U.S.C. § 192 (1946).

[65] CONG. GLOBE, 34th Cong., 3d Sess. 427 (1857), (emphasis supplied).

[66] A contemnor could not be imprisoned beyond the life of the current session of Congress. Simonton, for example, could only have been imprisoned for five weeks. The statute was primarily aimed at remedying this major deficiency in Congress' inherent powers. See, *e.g.*, remarks of Representative Orr, *id.* at 405-6, and of the Speaker of the House, CONG. GLOBE, 40th Cong., 2d Sess. 2579 (1868); and United States v. Bryan, 339 U.S. 323, 327 (1950).

It should be noted that Congress under its inherent powers and in furtherance of its investigative activities afforded the contumacious witness a continuing opportunity to purge himself prior to and following conviction. See, *e.g.*, CONG. GLOBE, 34th Cong., 3d Sess. 413 (1857) (James W. Simon-

that testimony being withheld by one James W. Simonton was material to the inquiry, it postponed interrogation a short time "to give the witness [who claimed that he would be breaching a confidence] time for reflection on the consequences of his refusal."[97] After recalling Simonton and informing him that a refusal would result in contempt proceedings, the Committee again propounded the original question. Simonton for his former reason refused to answer, and for that refusal was called before the bar of the House to show cause why he should not be cited for contempt.[98] To construe "refuses to answer" as not requiring these committee safeguards would, contrary to congressional intent, "confer" new power on congressional committees and "inflict" new burdens on the citizen.

The intent of Congress is confirmed by what it has done since enacting the statute of 1857. It continued to deal with contempt under inherent powers and with the

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ton); CONG. GLOBE, 37th Cong., 2d Sess. 831 (1862) (Henry Wikoff); and Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691, 780, 808-9 (1926). The statute makes no provision for a purge proceeding following conviction for contempt.

[97] CONG. GLOBE, 34th Cong., 3d Sess. 403 (1857).

[98] *Id.* at 411 *et seq.* Except for cases of a witness' failure to appear in response to a subpoena, so far as we can determine, on only one occasion between 1850 and 1857 did Congress consider contempt proceedings against a witness. CONG. GLOBE, 31st Cong., 1st Sess. 1679-80, 1694, 1714, 1716 (1850). During debate as to whether Thomas Ritchie, the witness, should be haled before the bar of the House to show cause why he should not be proceeded against in contempt, Congressman Stanton remarked that "the Committee did not indicate to [the witness after he declined to answer] that they were not perfectly satisfied." *Id.* at 1716. Congress decided not to call Ritchie before the bar of the House. *Ibid.*; HOUSE JOURNAL, 31st Cong., 1st Sess. 1343, 1345 (1850).

same procedures for 37 years, up to 1894,[69] when the first indictment was obtained under the statute.[70] In that case, *In re Chapman*, its constitutionality was upheld.[71] No question as to the meaning of the phrase "refuses to answer" was raised, for the witness demurred to the charge and the Congressional Record shows that he had been apprised by the committee.[72]

It was 30 years after the *Chapman* case and 67 years after enactment that the next indictment under the statute was obtained.[73] In that case, *Sinclair* v. *United States*,[74] the Court held that a witness refusing to answer, though acting in good faith on advice of counsel, "was bound rightly to construe the statute."[75] The case can-

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[69] See, *e.g.*, reports and debate concerning committee proceedings in which a witness refused to answer certain questions after a committee had rejected his grounds. CONG. GLOBE, 40th Cong., 3d Sess. 771 (1869) (Florence Scannell); CONG. GLOBE, 42d Cong., 3d Sess. 952 (1873) (Joseph B. Stewart); 4 Cong.Rec. 1707-8 (1876) (Hallett Kilbourn—*see* Kilbourn v. Thompson, 103 U.S. 168 (1880) (concerning this proceeding but not raising or deciding the question considered here)); 5 Cong.Rec. 352, 473 (1877) (E. W. Barnes, Enos Runyon).

[70] In addition to E. R. Chapman, there were six citations for contempt in 1894. 26 Cong.Rec. 5458, 6146, 6643, 8121 (1894), SENATE JOURNAL, 53d Cong., 2d Sess. 214-16, 238, 254 (1894). (Elisha J. Edwards, John S. Shriver, H. A. Havemeyer, J. E. Searles, J. W. McCartney, A. L. Seymour).

[71] 166 U.S. 661, 672 (1897).

[72] *Id.* at 661, 26 Cong.Rec. 6143 *et seq.* (1894).

[73] 65 Cong.Rec. 4785-91 (1924). (In 1916 H. Snowden Marshall was cited for contempt of Congress by publication, 53 Cong.Rec. 9639-70 (1916); he was released under habeas corpus proceedings. Marshall v. Gordon, 243 U.S. 521, 548 (1917).)

[74] 279 U.S. 263 (1929). To the same effect, see the Supreme Court's explanation of this case in United States v. Murdock, 290 U.S. 389, 397 (1933).

[75] *Id.* at 299.

not be read to support the contention that a committee's ruling and a subsequent opportunity to testify are not required before a witness is subjected to this burden.[76] That question was not before the Court—no doubt because, as an examination of the record reveals, that committee had provided the safeguard we discuss here. Sinclair was clearly apprised that his reasons for withholding testimony were rejected by the committee. After his counsel had fully presented his grounds for not answering, the committee, in Sinclair's presence, voted "that [he] be called to the stand to give testimony before this committee."[77] Sinclair then refused to testify and for this refusal was cited for contempt.

A random check of the citations for contempt of Congress for each year since the Sinclair episode of 1924 further supports this construction of the statute.[78] Until 1946, except for cases of naked refusals,[79] contempt proceedings were initiated only after a witness, fully apprised that his grounds were unacceptable, still refused to answer upon direction.[80] The Un-American Activities Committee itself, which confronts us with the problem

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[76] See Brief for Appellee, p. 50.

[77] Sinclair v. United States, Supreme Court, October Term 1928, No. 555, Transcript of Record, pp. 147-50.

[78] At least one citation for contempt by a witness refusing to answer certain questions for each year since 1924 in which Congress made such citations was examined. See note 100, *infra*, for citations.

[79] See note 58 and text, *supra*.

[80] See, *e.g.*, 69 Cong.Rec. 2440, 5286-8 (1928) (Robert W. Stewart, Thomas W. Cunningham); 78 Cong.Rec. 1904 *et seq.* (1934) (William P. MacCracken); 86 Cong.Rec. 3694-5, 3857 (1940) (James H. Dolsen, George Powers); 90 Cong. Rec. 8163 (1944), *Hearings before Committee to Investigate Campaign Expenditures on H.R. Res. 551*, 78th Cong., 2d Sess. 453-5 (1944) (Edward A. Rumely).

here, originally provided this safeguard.[81] At some undetermined time since the close of the last war, this Committee, unlike other congressional committees—the Kefauver[82] and the Senate Judiciary,[83] for example—temporarily failed to do so.[84] Despite this Committee's lapse, there is no indication that Congress ever intended to give to the word "refuse," in contempt cases, the new meaning the Government urges here. The legislative history is overwhelmingly to the contrary.

Although *United States* v. *Murdock*[85] does not involve § 192 or its predecessors, it is the case most heavily relied upon by the Government to support the proposition that this section does not require the Committee to rule upon objections before a refusal constituting contempt can occur.[86] I cannot agree. *Murdock* dealt with certain provisions of the Internal Revenue Code of 1926 and 1928,

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[81] See, *e.g.*, 86 Cong.Rec. 3695, 3857 (1940), reporting the proceedings before the House Un-American Activities Committee which resulted in citation for contempt of James H. Dolsen and George Powers.

[82] See, *e.g.*, 97 Cong.Rec. 499 (1951) (Joseph Doto); and see remarks of Senator Kefauver: "I can only say * * * that I have previously stated that counsel have considered the matter and have advised the entire committee that the refusal to answer certain questions and to follow the direction of the chairman in these cases constitutes a contempt." *Id.* at 505-6.

[83] See, *e.g.*, *Hearings before the Sub-Committee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary*, U. S. Senate, 82d Cong., 1st and 2d Sess. 76 (1951).

[84] We are informed by Government counsel on argument in the Bart case that the Un-American Activities Committee has recently resumed the traditional procedure which affords this safeguard; see, *e.g.*, 98 Cong.Rec. 8683-6 (June 30, 1952) (Saul Grossman).

[85] 284 U.S. 141 (1921).

[86] See Brief for Appellee, p. 49 *et seq.*

It merely held, *inter alia*, that an individual who withholds from an internal revenue agent information specifically required by statute[87] was not entitled under the prevailing statutory scheme to a separate court proceeding to test his grounds for refusal prior to indictment. The Court did not discuss whether the agent would be required to reject the grounds and to direct an answer before a "refusal" could occur. This question was not even raised." The Supreme Court has recently reminded us that in such circumstances a "case is not a binding precedent * * *."[88]

This question has, however, been directly considered in three recent district court cases. In *United States* v. *Browder*,[89] the court, in acquitting the defendant of contempt of Congress, said:

> "A search of the record will not disclose one instance when the Committee or its presiding member overruled the defendant's objections [based on pertinency] or offered to set him right if, perchance, his observations were ill founded or his position untenable in the eyes of the Committee.
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> * * * *
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> "His objections were not acted upon and he had the right to believe that his views and explanations were acceptable to the Committee."[91]

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[87] United States v. Murdock, Supreme Court, October Term 1931, No. 38, Transcript of Record, pp. 20, 21.

[88] It is interesting to note that the record discloses, as Judge Prettyman points out in his opinion in the Bart case, "that Murdock was made fully aware, in an extended discussion before the refusals, of the intentions of his questioners and of the consequences of refusal to answer their contemplated questions." Bart v. United States, p. 7.

[89] United States and Interstate Commerce Comm'n v. L. A. Tucker Truck Lines, 21 U. S. L. WEEK 4003, 4004 (Nov. 10, 1952).

[90] D.D.C., Criminal No. 1784-50, (March 14, 1951).

[91] *Id.* at 1, 4.

This view was followed in *United States* v. *Fox*[92] where the court observed that "there is no reason why a different procedure [from that pursued in the courts] should be permissible in cases involving contempt of Congress."[93] And again in *United States* v. *Kamp*,[94] the court declared:

> "Committees of Congress must conduct examinations in such a manner that it is clear to the witness that the Committee recognizes him as being in default, and anything short of a clear cut default • • • will not sustain a conviction for contempt of Congress. • • • The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding member to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then to rule on the witness' response."[95]

Although the Supreme Court has not ruled directly on this question, there is support for this construction in *Bryan* v. *United States*.[96] There, in holding that a witness is required to inform the committee of his grounds at the time he objects to answering, and that grounds first raised at a court proceeding will not be considered, the Court said: "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes."[97] Underlying this decision is an assumption that a committee is required to rule on an objection. For if the committee is entitled to an opportunity to consider an objection, it would follow that the witness, in turn, is entitled to be clearly apprised of a committee's adverse ruling.

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[92] D.D.C., Criminal No. 1798-50 (June 29, 1951).

[93] *Id.*, Transcript of Proceedings, p. 3.

[94] 102 F.Supp. 757 (D.D.C. 1952).

[95] *Id.* at 759.

[96] 339 U.S. 323 (1950).

[97] *Id.* at 333.

Considerations of fundamental fairness support this construction of the statute.[98] In fact, I believe that this is only a minimal requirement and that Congress might well consider amending this statute to include the opportunity for purge which it accords in proceedings under its inherent powers.[99] Another important consideration stems from the fact that Congress has felt obliged to cite more witnesses for contempt during the last 2½ years than during the preceding 92.[100] Although the pro-

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[98] While recognizing the necessity of congressional power to compel testimony, Wigmore said prophetically: "Not only does the logic of the legislative needs call for a strict limitation of this power, but also the policy of the situation; for the Legislatures are not bound by, and do not employ, the evidential rules that in judicial trials protect parties and witnesses and check abuses of power. * * * Moreover, legislative inquiries are sometimes conducted for partisan purposes and personal aggrandizement, and there is a particular temptation to pursue the inquiry beyond the necessities of contemplated legislation and to assume improperly the function of a grand jury.

"* * * (4) The Judiciary are entitled to define and declare the limitations of the power." 8 WIGMORE, EVIDENCE § 2195, pp. 80-1 (3d ed. 1940).

[99] See note 66, *supra*.

[100] 1857-1949 113 citations for contempt (number of citations for each year in italics):

HOUSE JOURNAL, 34th Cong., 3d Sess. 241, 271 (1857) *2*; HOUSE JOURNAL, 35th Cong., 1st Sess. 258, 371 (1858) *2*; HOUSE JOURNAL, 35th Cong., 2d Sess. 411 (1859) *1*; SENATE JOURNAL, 36th Cong., 1st Sess. 159, 178, 242 (1860) *5*; HOUSE JOURNAL, 37th Cong., 2d Sess. 210, 298, 498, 948 (1862) *4*; CONG. GLOBE, 37th Cong., 3d Sess. 314, 370 (1863) *1*; HOUSE JOURNAL, 39th Cong., 2d Sess. 166, 252, SENATE JOURNAL, 40th Cong., 1st Sess. 186 (1867) *3*; HOUSE JOURNAL, 40th Cong., 2d Sess. 729 (1868) *1*; HOUSE JOURNAL, 40th Cong., 3d Sess. 226, 250, 392 (1869) *4*; CONG. GLOBE, 42d Cong., 3d Sess. 952, 956 (1873) *1*; HOUSE JOURNAL, 43d Cong., 1st Sess. 716, HOUSE JOURNAL, 43d Cong., 2d Sess. 51-2 (1874) *2*; HOUSE JOURNAL, 43d Cong., 2d Sess. 159, 205 (1875) *2*; HOUSE JOURNAL, 44th Cong., 2d Sess. 534, 588,

cedure required by my view would not eliminate deliberately arbitrary and obstructive resistance to congressional authority, it is calculated to eliminate resistance attributable to ambiguous procedures. It would thereby better serve the objectives of congressional power to compel testimony, namely, to effectuate the legislative function and to preserve the dignity of Congress.[10] A clear ruling upon a witness' reason for objecting to answer, and another opportunity to reply, increase the probability of securing desired information. And such a procedure more clearly comports with our traditional concept of the worth of the individual personality upon which the dignity of Congress and of all free institutions so vitally depends.

1189 (1876) *3*; *Id.* at 149, 219, 313, 631, SENATE JOURNAL, 44th Cong., 2d Sess. 87, 196, 228 (1877) *9*; SENATE JOURNAL, 46th Cong., 2d Sess. 73 (1879) *5*; 22 Cong.Rec. 1973, 2150 (1891) *1*; 26 Cong.Rec. 5458, 6146, 6643, 8121, SENATE JOURNAL, 53d Cong., 2d Sess. 214-16, 238, 254 (1894) *7*; 50 Cong.Rec. 1431-52 (1913) *1*; 53 Cong.Rec. 9639 (1916) *1*; 65 Cong.Rec. 4785-91, 7216 (1924) *1*; 69 Cong.Rec. 2439, 5286, 5353, 7239 (1928) *2*; 78 Cong.Rec. 1914 (1934) *4*; 79 Cong.Rec. 13077 (1935) *2*; 80 Cong.Rec. 8222 (1936) *3*; 81 Cong.Rec. 953 (1937) *6*; 86 Cong.Rec. 3694, 3856, 4152, 4153, 4156 (1940) *5*; 90 Cong.Rec. 8163 (1944) *2*; 92 Cong. Rec. 2744, 3762-73, 7591, 10592, 10748 (1946) *20*; 93 Cong. Rec. 1128, 3804, 3814, 10770, 10780, 10794-802 (1947) *13*.

1950-June 1952 117 citations for contempt:

96 Cong.Rec. 12237, 12256, 12260, 12286-89, 12296-382, 13873, 13894, 14639, 15727 (1950) *64*; 97 Cong.Rec. 499, 506, 507, 1096, 1453, 3038, 3039, 7014, 8702, 9803, 12406, 12407 (1951) *45*; 98 Cong.Rec. 836-43 (Feb. 5, 1952), 1338 (Feb. 25, 1952), 2397 (March 17, 1952), 2537 (March 19, 1952), 3904 (April 9, 1952), 8675-83 (June 30, 1952) *8*.

[10] For comments on Congress' investigatory power, see, *e.g.*, In re Chapman, 166 U.S. 661, 671-2 (1897); United States v. Bryan, 339 U.S. 323, 327 (1950); and cases cited in 8 WIGMORE, EVIDENCE § 2195, pp. 75-80 (3d ed. 1940). And see Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691, 780, 804-27 (1926).

III.

The court below adopted the erroneous view that appellant could not claim the privilege against self-incrimination by reference and adoption of the language used by another.[102] Thus it neither reached nor decided whether the adopted language amounted to a claim of the privilege against self-incrimination. I have joined with some of my brethren to constitute a majority of this court in ordering a new trial because I agree that minimally the court below ought to decide this question in the first instance.[103] Under my view, however, the court must not only determine (1) whether the adopted language amounted to a claim of the privilege against self-incrimination but (2) whether it amounted to any other claim (not plainly frivolous), such as, lack of pertinency or protection of First Amendment rights; and if it did amount to such a claim, then (3) whether the Committee clearly apprised appellant of its rejection and afforded another opportunity to answer; and only if this safeguard were provided, (4) whether the claim was valid.

FAHY, *Circuit Judge*, concurring: I agree with Judge Prettyman's opinion that appellant was not entitled to a hearing on his motion to dismiss the indictment as void because ten members of the jury which indicted him were Government employees and two were wives of Government employees, but that the case should be remanded for a new trial (1) so that the issue whether or not Quinn claimed the privilege by adopting the statement made by Fitzpatrick may be initially decided in the trial court, and (2) for determination whether or not Quinn was aware of the intention of his inquirer that answers were required despite his objections. As the opinion states, the deliberate and intentional character of the refusal is an element of the offense. The necessity for

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[102] Court's opinion, p. 4.

[103] As expressed in my dissents in Bart and Emspak.

awareness by the witness of the intention of his inquirer to require answers despite the witness' objections, and the necessity for a deliberate and intentional refusal, are shown by the analysis in Section II of Judge Bazelon's opinion. The formulation in Section III of his opinion of the issues involved furnishes a practical guide to the trier of the facts.

WILBUR K. MILLER, Circuit Judge, *dissenting*: I agree with the majority that the trial judge erred in holding as a matter of law that Quinn could not adopt Fitzpatrick's statements for whatever they were worth. But, for reasons to be stated later, my view is that Quinn was not prejudiced by that erroneous ruling, and therefore I think my brothers of the majority are wrong in reversing his conviction and remanding the case for the trial judge to say whether Fitzpatrick did or did not claim the protection of the Fifth Amendment against being compelled to testify against himself.

The court's action in reversing and remanding seems to me to arise from, and to depend entirely upon, the following statements in the majority opinion:

> ". . . The trial court made no ruling upon the meaning or the sufficiency of Fitzpatrick's statement. Having held that Quinn could not as a matter of law adopt it, the court was not called upon to consider it."

Perhaps the trial judge was not "called upon to consider it," but I cannot believe the judge's erroneous legal conclusion, that Quinn could not claim immunity by adopting Fitzpatrick's language, precluded him from considering whether that language was legally sufficient as a claim of immunity from self-crimination. If the trial judge actually considered Fitzpatrick's statements and held them insufficient as a claim of privilege, my view is that we should regard that holding as an alternative basis for the finding of guilt, which after all was the ultimate finding of the trial

judge. I do not believe we should set aside a correct ultimate finding that a defendant is guilty because the trial judge gave two reasons for it, one of which was wrong and one of which was right.

With those considerations in mind, I suggest the majority are incorrect in saying the district judge made no ruling upon the meaning or sufficiency of what Fitzpatrick said in attempted justification of his refusal to answer the question. If I am correct in that belief—that is to say, if the district judge did make such a ruling—then the sole basis for reversal disappears, and the remand is for the futile purpose of permitting the trial judge to make a finding which he has already made.[1]

Moreover, while I do not stress the point, I think it extremely doubtful whether the District Court was required, in the circumstances, to make a special finding concerning the sufficiency of Fitzpatrick's remarks as a claim of the privilege. Rule 23(c) of the Federal Rules of Criminal Procedure provides: "In a case tried without a jury, the court shall make a general finding and shall in addition on request find the facts specially." The general finding referred to in the rule is a finding of either guilty or not guilty.[2] Here the trial judge an-

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[1] Furthermore, I doubt if the question whether Fitzpatrick's statements amounted to a claim of immunity is a question of fact at all. There is no issue as to what Fitzpatrick's language was—there is no contrariety of proof as to what words he used. The question was, did that language, those words, constitute a claim of immunity? Counsel for Quinn conceded during oral argument that this is a legal question and not an issue of fact. But whether so or not, it is in my view unnecessary to decide, since I think the issue of fact (if it be such) which the majority say the trial court should have determined, and for the determination of which they remand the case, was actually decided by the trial judge, as I shall show later in this opinion.

[2] 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2124.

nounced the general finding of guilty as charged. No request for special findings was submitted.

I question whether, under Rule 23(c), a trial judge is required to make special findings on all the factual issues involved, when none had been requested, merely because he announced findings on some of the issues of fact in the course of the opinion which preceded his general finding of guilty. Be that as it may, however, I think it quite clear that in this case the trial court stated, while delivering his opinion, a finding that Fitzpatrick's statements did not amount in legal effect to a claim of the privilege against self-incrimination.

The erroneous legal ruling by the district court that Quinn could not adopt Fitzpatrick's language did not mean the judge had not read and considered that language, nor that he had not formed and expressed an opinion as to whether Fitzpatrick had actually claimed the privilege. The contrary appears. The trial judge's opinion shows he had read and considered Fitzpatrick's statements. He noted their nature and found them insufficient as a claim of immunity against compulsory self-incrimination. I quote from the District Court's opinion:

> ". . . the Court will not go into detail of the position which Mr. Fitzpatrick took, other than to say that it certainly left much to be desired as to whether he was actually claiming self-incrimination or not.
>
> "It is to be observed that his answers—and I speak of Mr. Fitzpatrick's—were long and rambling. They had a major theme, which seemed to be that the committee was prostituting its office and seeking to aid a rival group in a forthcoming [local union] election."

To be sure, the judge did not apply the "finding of fact" label to this evaluation of Fitzpatrick's language, but that is immaterial. Whether the issue was one of fact or law, the judicial observations just quoted were tantamount to a finding that Fitzpatrick's remarks to the subcommittee did not amount to a reliance upon the shel-

ter of the self-incrimination clause. For, when the judge said those remarks "certainly left much to be desired as to whether he was actually claiming self-incrimination or not," he was clearly saying Fitzpatrick had not asserted the claim in the way the cases say a witness must invoke it in order to be entitled to its protection. So, the erroneous legal ruling did not prejudice Quinn.

The privilege against self-incrimination, when invoked properly, is liberally construed and applied; but the language of the witness which is said to constitute a claim of the privilege is strictly construed and appraised. This will appear from cases hereinafter cited. Nor is the privilege automatically applicable to every question which requires an incriminating answer. It is personal to the witness, and is waived unless he claims it at the time when, and in the tribunal where, the question is asked. The Supreme Court said in *United States v. Monia*, 317 U. S. 424, 427 (1943):

> "The Fifth Amendment declares that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' . . . The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amednment."

What must a witness say in order to claim the privilege? He must in some manner fairly bring to the attention of the tribunal which must pass upon it, the fact that he is invoking and relying upon the constitutional privilege. He must claim it in no uncertain terms. He must use some expression directly indicative of the intention to claim this particular protection of the Fifth Amendment, as distinguished from other constitutional rights. In *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 113 (1927), the Supreme Court said:

". . . The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. See *In re Knickbocker Steamboat Company*, 139 Fed. 713 [716]; *United States v. Skinner*, 218 Fed. 870, 876; *United States v. Elton*, 222 Fed. 428, 435."

In the *Knickerbocker Steamboat* case, cited by the Supreme Court, it was said:

". . . Incriminating matter may appear but a party may not desire to resort to the privilege of not answering with respect thereto. If he does, he must say so in unmistakable language and give the reasons for shielding himself."

In the later case of *Rogers v. United States*, 340 U. S. 367, 370 (1951), the Court said:

"If the petitioner desired the protection of the privilege against self-incrimination, she was required to claim it. *United States v. Monia*, 317 U. S. 424, 427 (1943). The privilege 'is deemed waived unless invoked.' *United States v. Murdock*, 284 U. S. 141, 148 (1931). Furthermore, the decisions of this Court are explicit in holding that the privilege against self-incrimination 'is solely for the benefit of the witness,' and 'is purely a personal privilege of the witness.'"

The following is from the opinion of the Eighth Circuit in *Phelps v. United States*, 160 F. (2d) 858, 872 (1947):

"There is, of course, no prescribed or crystalized formula for claiming the privilege against self-incrimination. The provision in 50 U.S.C.A. Appendix, § 922(g), (and in other recent statutes) that the privilege against self-incrimination must be 'specifically' claimed, would seem to imply, however, that there must be some expression directly indicative of the intention to claim the particular privilege, as distinguished from other possible rights, and reasonably communicative of the fact that this is what is being done."

The District Court for the Eastern District of Pennsylvania, in *United States v. Miller*, 80 F. Supp. 979, 982 (1948), said:

> ". . . The witness, upon oath, must claim his privilege in no uncertain terms at the proceeding in which the information is sought or he will not thereafter be considered to have been 'compelled' within the meaning of the Amendment."

To this the court cited the *Vajtauer* case, *supra*, *United States v. Murdock*, 284 U. S. 141 (1931), and *United States v. Benjamin*, 120 F. (2d) 521, 522 (2nd Cir. 1941).

The opinion in the *Benjamin* case was written by Judge Augustus N. Hand and was concurred in by Judges Learned Hand and Swan. The following quotation therefrom supports my belief that a witness cannot claim the privilege by announcing that he stands on his constitutional rights, thus leaving it to the court to guess the provision upon which he relies; and that he cannot claim it by saying he relies upon the First and Fifth Amendments without pointing out the particular protection which he seeks out of the several afforded by those two Amendments:

> "The appellant filed a plea in abatement in which he alleged that he had been subpoenaed to appear before a grand jury investigating the subject matter of the above indictment. He alleged that he thereupon appeared and asserted his constitutional immunity against being compelled to testify, but notwithstanding this was examined and compelled to give testimony. Upon the trial of the plea it was shown that when he came before the grand jury he was told that he was at liberty to assert his privilege in respect to any answers to questions which might tend to incriminate him. He thereupon stated that he was going to stand upon his constitutional rights. In response to questions relating to his dealings with Bob he answered the questions freely without raising constitutional objections. He was not only a lawyer

himself but appears to have been advised by counsel. We have no doubt that his rights were not invaded. It is to be remembered that the appellant had not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated which might tend to incriminate him. O'Connell v. United States, 2 Cir., 40 F. 2d 201, 205; Mulloney v. United States, 1 Cir., 79 F. 2d 566. As Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry'. Wigmore Evidence, 2d Ed., § 2268. The appellant is apparently under the erroneous impression that a general statement that he would stand upon his constitutional rights was a substitute for objections to answering specific questions."

From these authorities I deduce the principle that a witness waives the privilege unless he claims it clearly, distinctly, expressly, specifically and in unmistakable terms. When the district judge said Fitzpatrick's position "certainly left much to be desired as to whether he was actually claiming self-incrimination or not," he was finding that Fitzpatrick had not claimed the privilege in the fashion the cases say it must be invoked if waiver is to be avoided. In order to amount to a claim, the language of a witness must leave *nothing* to be desired.

The majority of this court agree, I note, with the trial judge's appraisal of Fitzpatrick's statement. They say:

> "Perhaps, if we were of clear opinion that Fitzpatrick, and therefore Quinn, did claim the privilege and so must be acquitted, we should dispose of the matter finally here and now. . . . But a majority of the court are not of that clear opinion, . . ."

We should not let the fact that Quinn and Fitzpatrick would have been entitled to the privilege, had it been

invoked,[3] color our thinking as to whether the privilege was claimed. The question is not whether immunity should have been granted if claimed; it is whether the privilege was claimed. For, as the Supreme Court said in *United States v. Murdock*, 284 U. S. at 148:

> ". . . The validity of his justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 113."

A brief analysis of the statements made to the subcommittee by Quinn and Fitzpatrick will suffice to show adequate support for the District Court's holding that neither claimed the protection of the Fifth Amendment against being compelled to testify against himself. I agree with the majority that their statements should be considered and evaluated "in full text and context." When Quinn was asked the crucial question, his immediate reply was this:

> "I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire."

When the question was repeated, Quinn said:

> "I decline to discuss with the committee questions of that nature."

Thus Quinn gave his understanding of Fitzpatrick's reason for refusing to answer the question: he understood Fitzpatrick to have relied upon the constitutional right

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[3] The Supreme Court in *Blau v. United States*, 340 U. S. 159 (1950), held that questions as to connections with the Communist Party are subject to the privilege against self-incrimination as calling for disclosure of facts tending to criminate under the Smith Act.

of the American people to keep secret their political beliefs, opinions and associations. This was an obvious reference to the freedom of speech clause of the First Amendment and its correlative freedom of silence, and was by no means an assertion of a personal claim by Quinn to refrain from answering on the ground that in doing so he might incriminate himself. Having stated that Fitzpatrick's statements could be regarded as the expression of his own views, Quinn said:

> ". . . I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred, I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am."

This about covers Quinn's examination except for this further statement by him:

> "Yesterday one of the Congressmen on the committee made the statement that people brought down here were being given an opportunity to clear themselves, as it were. I would like to say I don't feel it is an opportunity to clear myself. I feel the opportunity I am given here is a choice of clearing myself at the price of assisting this committee and destroying the Constitution, and I could not join the committee in doing that.
>
> • • • •
>
> "I think it is clear this hearing was called solely for the purpose of interfering with our election."[4]

Far from invoking a constitutional protection for himself, Quinn conceived that he was defending the Constitution against the encroachment of the subcommittee.

In the light of the foregoing, I suggest that no matter what Fitzpatrick had said, Quinn demonstrated his un-

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[4] Quinn and Fitzpatrick were, at that time, candidates for office in a local union at Pittsburgh. The union election, to be held soon thereafter, was that to which the appellant referred.

derstanding of the statements he adopted as being that all the American people, including himself, had the right to keep secret their political beliefs, opinions and associations, and that he was prepared to defend this First Amendment freedom against the attack of the subcommittee.

Putting that suggestion aside, however, and assuming that Quinn's adoption of Fitzpatrick's language was without qualification on his part, so as to entitle him to the privilege if Fitzpatrick had in fact claimed it, I now consider Fitzpatrick's statements in full text and context. As the district judge observed, Fitzpatrick's remarks were long and rambling. He began by asking and obtaining permission to make a few preliminary remarks. After a diatribe against the committee, he said:

> "I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.
>
> "The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment."

Following this, Fitzpatrick was asked the question whether he was or had ever been a member of the Communist Party. His immediate response was this:

> "Mr. Chairman, in my opening remarks I gave quite a bit of my attitude on this question. I say

that this committee has no right to pry into my mind."

Upon insistence by the committee counsel that he answer "yes" or "no," or decline to answer, Fitzpatrick said:

"I will answer the question. The Constitution guarantees the right to me and every other citizen to have beliefs, whether they are popular or unpopular, and to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Constitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here."

After this statement the following colloquy occurred between Fitzpatrick on the one hand and the chairman and counsel on the other:

"Mr. Wood. Now will you answer the question?
"Mr. Fitzpatrick. I have answered the question.
"Mr. Wood. It is not an answer at all.
"Mr. Fitzpatrick. That is my answer.
"Mr. Wood. Do you mean that is the only answer you are going to give?
"Mr. Fitzpatrick. That is the way it has to be answered, according to my conscience.
"Mr. Wood. Is that the only answer you will give to the question whether you are now or ever have been a member of the Communist Party?
"Mr. Fitzpatrick. That is the only answer I can conscientiously give you.
"Mr. Tavenner. Mr. Fitzpatrick, you were present yesterday during the testimony here. You heard it stated under oath that you are a member of the Communist Party. Do you deny that accusation?
"Mr. Fitzpatrick. The answer to my previous question is the answer to this question. I have no intention of permitting this committee to abridge my constitutional rights on political opinions, associations, who I work with, who I meet with, what I read or think, or anything of that kind.
"Mr. Tavenner. So, in other words, you refuse to answer the question?

"Mr. Fitzpatrick. I don't refuse to answer the question. I have answered the question."

During the remainder of his testimony Fitzpatrick made such statements as:

". . . I have no intention of discussing my political actions or activities with this committee, for the reasons that I have stated before."

"I say it is no affair of the committee what organizations I belong to. The previous answer applies."

". . . So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation."

". . . The opportunity you give me is to join with you and these other witnesses who appeared here yesterday and say the Constitution is a scrap of paper and it gives no protection to the people and you fellows have a right to delve into the mind of everybody who comes here."

". . . Do you have thought control in the United States now? Are you going to convict people on thinking? I think maybe you fellows should read that Constitution."

I find nothing in Fitzpatrick's testimony which even indicates that he refused to say whether he was or ever had been a member of the Communist Party because he feared his answer might incriminate him, or that he relied on the self-incrimination clause of the Fifth Amendment in declining to respond. It is true that he mentioned the Fifth Amendment twice. His first reference to it was a preliminary remark which I have quoted above, when he said people can have unpopular opinions or beliefs and hold them secret if they so desire. "This," he said, "is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment."

Thus he described his reference to the two Amendments as being the freedom of speech and silence guaranteed to all people by the First Amendment, as somehow supplemented by the Fifth,—perhaps the due process clause.

His point was that all people have the right to keep silent as to their political opinions because the freedom of speech clause guarantees that right; that he shared in that right and refused to answer because of it,—not at all because to speak of his political opinions and associations might incriminate him.

A second time Fitzpatrick referred to the First and Fifth Amendments, when he was asked whether he had solicited one Copeland to join the Communist Party, and responded by saying:

> "I will not talk about my association and actions with people who I know, what I did, or anything else. I don't think it reflects on my loyalty or disloyalty or anything else."

The chairman of the committee then inquired:

> "Mr. Fitzpatrick, did you ever at any time during the year 1943 furnish an application blank and request Clarence D. Copeland to sign and make application for membership in the Communist Political Association, or the Communist Party?
>
> "Mr. Fitzpatrick. Mr. Chairman, do I have to give you my answer again?
>
> "Mr. Wood. I just want to know whether you did that one thing.
>
> "Mr. Fitzpatrick. I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.
>
> "Mr. Wood. And for that reason do you decline to answer the question?
>
> "Mr. Fitzpatrick. I stand on the protection of the Constitution, the First and Fifth Amendments.
>
> "Mr. Wood. And for those reasons decline to answer the questions further?
>
> "Mr. Fitzpatrick. I have answered the question.
>
> "Mr. Wood. I say, do you decline to answer it further?
>
> "Mr. Fitzpatrick. I have no further comment on it."

In this instance also, Fitzpatrick made it abundantly clear he was not invoking the two Amendments to avoid giving an incriminating answer, but that he thought the

Amendments barred the committee from asking the question which would pry into his mind and would violate his constitutional right to be silent if an answer were compelled. I find it impossible to regard Fitzpatrick's statements as amounting to a claim to the constitutional immunity from self-incrimination. Measured by the strict standards announced in the cases I have cited, by which the language of a witness must be measured in determining whether he actually intended to and did claim the privilege, Fitzpatrick's statements fall far short of constituting such a claim. As the trial judge said, they certainly leave much to be desired. Cf. *Emspak v. United States*, decided this date.

I conclude, therefore, that the district judge not only did in fact find that Fitzpatrick did not claim the privilege, but also that he was amply justified in so finding, despite the fact that, after Quinn's conviction, Fitzpatrick himself was found not guilty by a different district judge, 96 F. Supp. 491 (1951), who seems not to have considered Fitzpatrick's statements "in full text and context," but acquitted him solely because he used the words "Fifth Amendment." I think it is impossible to spell out a claim of the privilege from Fitzpatrick's references to the Fifth Amendment, when they are considered in full text and context. Considered in that realistic way, they show Fitzpatrick had no intention of invoking the Amendment's privilege against self-incrimination. I would affirm the judgment of the District Court.

I am authorized to say Judge Proctor concurs in this dissenting opinion; and that Judge Clark also concurs except that, being of the opinion that the claim of privilege is a highly personal one and must be made by the person claiming it and not by reference, he thinks the trial judge was right in holding Quinn could not adopt the statements of Fitzpatrick.

[fol. 213] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11081

THOMAS QUINN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

Before Stephens, Chief Judge, and Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy and Washington, Circuit Judges

JUDGMENT—Filed December 19, 1953

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

Per Circuit Judge Prettyman.

Dated: December 19, 1952.

Separate opinion by Circuit Judge Bazelon, with whom Circuit Judge Edgerton joins, concurring in the result.

Separate concurring opinion by Circuit Judge Fahy.

Dissenting opinion by Circuit Judge Wilbur K. Miller. Circuit Judge Proctor concurs in the dissenting opinion. Circuit Judge Clark also concurs in the dissenting opinion except that, being of the opinion that the claim of privilege is a highly personal one and must be made by the person claiming it and not by reference, he thinks the trial judge was right in holding Quinn could not adopt the statements of Fitzpatrick.

[File endorsement omitted.]

[fol. 218] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,081

[Title omitted]

Before Stephens, Chief Judge, and Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy, and Washington, Circuit Judges, in Chambers

ORDER—Filed April 13, 1953

Upon consideration of appellant's petition for a rehearing en banc herein, it is

Ordered by the Court that said petition be, and it is hereby, denied.

Per Curiam.

Chief Judge Stephens did not participate in the foregoing action.

[File endorsement omitted.]

[fol. 219] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,081

[Title omitted]

DESIGNATION OF RECORD—Filed May 1, 1953

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Order, dated March 26, 1952, by the Court *sua sponte* setting case for rehearing *en banc*.
3. Opinion.

4. Judgment.
5. Petition for rehearing.
6. Order denying petition for rehearing.
7. This designation.
8. Clerk's certificate.

Allan R. Rosenberg, Counsel for appellant.

Certificate of Service by Mail, dated April 29, 1953, omitted in printing.

[File endorsement omitted.]

[fol. 220] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 221] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 66

THOMAS QUINN, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated for argument with No. 67, and one and one half hours are allowed to each side.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~795~~ [redacted]8

THOMAS QUINN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

THOMAS QUINN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Thomas Quinn, the petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, made December 19, 1952 (R.) reversing the judgment of conviction of the petitioner and remanding the case for a new trial.

Opinions Below

The opinion of the Court of Appeals reversing the judgment of conviction and remanding the case for a new trial is not yet reported (R.). The opinion of the District Court ordering a judgment of conviction is not yet reported (R. 84). The opinions of the District Court denying petitioner's motions to dismiss the indictment are reported at 95 Fed. Supp. 1010, 1012.

Jurisdiction

The judgment of the Court of Appeals was entered on December 19, 1952. A petition for rehearing was denied on April 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Summary Statement of Matter Involved

A. The Congressional Hearing.

The petitioner, Thomas Quinn, is an employee of the Westinghouse Electric Corporation in East Pittsburgh, Pennsylvania, and is a field representative of the United Electrical, Radio and Machine Workers of America (hereafter referred to as UE or the Union), a national labor union representing employees in the electrical, radio and machine industry. He appeared pursuant to subpoena on August 11, 1949, before four representatives of the Committee on Un-American Activities of the House of Representatives. The hearings in which the petitioner testified were subsequently printed by the Committee and are contained in a pamphlet entitled, "Hearings regarding Communist Infiltration of Labor Unions—Part I (Local 601, United Electrical, Radio and Machine Workers of America, CIO, Pittsburgh, Pa.) (Hearings before the Committee on Un-American Activities, House of Representatives, 81st Congr., 1st Session, August 9, 10 and 11, 1949)." *

Petitioner was subpoenaed to appear on August 10th, together with Thomas J. Fitzpatrick and Frank Panzino, fellow employees in the Westinghouse East Pittsburgh plant and fellow members and officers of UE Local 601.

---

* These hearings constitute Government Exhibit One, and by agreement of the parties were not printed in the joint appendix in the court below.

All three UE members answered to their subpoenas on August 10, 1949, as directed. Fitzpatrick and Panzino testified before the Committee that day and petitioner testified before the Committee the following morning, August 11, 1949.

At the outset of the hearings the counsel for the Committee formally announced that the purpose of the hearing was to inquire into the question of Communist affiliation of certain members of Local 601 of the UE (R. 115). After several preliminary questions as to employment and membership in the UE, Fitzpatrick, Panzino and petitioner were asked questions concerning alleged membership in the Communist Party. Fitzpatrick was the first of the three UE members to be asked these questions and declined to answer the questions by relying upon "The First and Fifth Amendments" (R. 110) as well as the "First Amendment to Constitution supplemented by the Fifth Amendment" (R. 107). Both Panzino and petitioner, following Fitzpatrick's testimony, refused to answer the identical questions, specifically adopting as their own the grounds relied upon by Fitzpatrick.

B. The Proceedings Below.

Subsequent to their testimony Fitzpatrick, Panzino and petitioner were indicted for violation of Section 192, Title II, U. S. Code, by a grand jury empaneled on October 3, 1950.*

Petitioner was indicted upon a single count for refusal to answer a question as to "whether he was or ever had been a member of the Communist Party" (R. 3).

---

* Fitzpatrick and Panzino were subsequently tried and acquitted by the District Court. In *U. S.* v. *Fitzpatrick*, 96 F. Supp. 491, Judge Morris upheld Fitzpatrick's statement as a valid assertion of his Fifth Amendment privilege and entered a judgment of acquittal. Similarly in *U. S.* v *Panzino*, Criminal #1747-50, unreported, District of Columbia, the late Judge Goldsborough upheld Panzino's assertion and entered a judgment of acquittal. See Supplement One to petition for certiorari in *Emspak* v. *U. S.*

On December 17, 1950, petitioner filed a motion to dismiss the indictment and for other appropriate relief upon the grounds, *inter alia*, that the indictment violated the constitutional privilege against self-incrimination contained in the Fifth Amendment to the Constitution (R. 4).

The motion further sought dismissal of the indictment, or, in the alternative, a hearing, on the ground that there were less than twelve members of the Grand Jury which voted the indictment who were impartial and free from prejudice and bias against the defendant (R. 6).

Petitioner attached to the motion a series of affidavits dealing both with the claim of privilege as well as with the contention that the Grand Jury was illegally constituted. Thereafter, petitioner filed a supplementary affidavit attacking the qualifications of the Grand Jurors (R. 34).

On January 19, 1951, Judge Kirkland granted the Government's motion to strike certain of the affidavits and attached exhibits dealing only with the claim of privilege upon the ground that they were not appropriate to be considered in connection with pre-trial motions. On the same day Judge Kirkland, apparently *sua sponte*, struck as legally insufficient petitioner's supplementary affidavit on the qualifications of the Grand Jurors (R. 34). Thereafter petitioner made an offer of proof of the allegations of fact set forth in the affidavits theretofore filed on the qualifications of the Grand Jurors (R. 158).

On January 26, 1951, Judge Kirkland handed down an order and opinion holding, *inter alia*, that neither the circumstances recited in the motion to dismiss nor those referred to in the offer of proof with respect to the qualifications of the Grand Jury justified granting the relief requested by petitioner (R. 63; 95 Fed. Supp. 1010).

Thereafter, on January 31, 1951, Judge Kirkland filed a second opinion holding that the count involved in the

instant indictment, as well as several others with which he dealt simultaneously, "apparently on their face were directed to one single line of inquiry which was a specific phase of inquiry then being considered by the Committee" (R. 66).

After a trial without jury the District Court found the petitioner guilty, holding as a matter of law that the Fifth Amendment privilege may not be asserted by referring to and adopting the language used by another (R. 138).

The petitioner was sentenced on February 26th to a term of four to twelve months and a fine of $1,000 (R. 84). On February 27th the judgment and commitment was vacated and sentence of one year imprisonment and $500 fine was imposed by Judge Kirkland (R. 84). On February 28th this judgment and commitment was vacated by Judge Kirkland and the original judgment reinstated (R. 85). On May 18th the judgment of February 26th was vacated by Judge Kirkland and sentence of six months' imprisonment and $500 fine was imposed (R. 86).

On October 5, 1951, an appeal from the judgment of the District Court was argued before a division of the Court of Appeals. Several months thereafter the Court of Appeals *sua sponte* ordered the appeal set down for reargument before the Court *en banc*. Pursuant to this order reargument was heard before the full Court *en banc* in May, 1952. On December 19, 1952, the Court of Appeals *en banc* filed its opinions reversing the judgment of conviction and remanding the case to the District Court for a new trial. There was no majority of the Court on any one major issue in the case.

C. Statutes, Resolutions and Rules Involved.

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.

That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

3. Rules of Criminal Procedure:

Rule 6. The Grand Jury.

(b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(b) THE MOTION RAISING DEFENSES AND OBJECTIONS.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of deter-

mination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense *may be raised* only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

Questions Presented

1. Whether petitioner asserted the Fifth Amendment privilege against self-incrimination in response to a question put to him by a Sub-Committee of the House Committee on Un-American Activities.

2. Whether the conviction of the petitioner is barred under the principles of *res adjudicata* and estoppel.

3. Whether a witness before a Congressional Committee must be specifically directed to answer by the Committee before he can be held in violation of Title 2, Section 192.

4. Whether House Resolution 5, as construed and applied herein, abridged the petitioner's freedom of speech, press and assembly in violation of the First Amendment to the Constitution.

5. Whether the motion for a hearing to investigate the qualifications of the grand jury was improperly denied in the face of a detailed offer of proof and affidavits showing the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the government's request.

Reasons for Granting the Writ

There is presented here for decision a fundamental question involving the interpretation, application and enforcement of the constitutional privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States. This is a question which has not yet been but should be considered and authoritatively settled by this Court.

There are presented also questions relating to the impact of Congressional investigations and inquiries upon the fundamental liberties and rights of citizens guaranteed by the U. S. Constitution. There are also presented questions relating to the administration of federal criminal procedure, which require the consideration of this Court.

Certain of these questions are of general importance relating to the construction and application of the Constitu-

tion of the United States as well as statutes of the United States decided by the U. S. Court of Appeals for the District of Columbia which have not been but should be settled by this Court. These questions have been decided in a way in conflict with the decisions of other Circuit Courts of Appeal on the same matter and have been decided in a way probably in conflict with the applicable decisions of this Court.

I

The lower court erred in not directing a judgment of acquittal on remand in that the petitioner properly asserted the Fifth Amendment privilege against self-incrimination.

A central issue in this petition involves a fundamental question relating to the interpretation of the constitutional privilege against self-incrimination guaranteed by the Fifth Amendment.

The trial court convicted the petitioner solely upon the theory that one may not invoke the Fifth Amendment privilege by referring to and incorporating the assertion and position of another witness. Eight of the nine Court of Appeals judges agreed that the district court was in error in so holding,* and the Government so conceded before the Court of Appeals.

The Court of Appeals, therefore properly concluded that the question thus posed was "whether Quinn, by adopting Fitzpatrick's statement, asserted a privilege against self-incrimination. Basically, of course, that question concerns what was in Quinn's mind. But courts cannot act upon unrevealed intentions, and so the *inquiry must be whether Fitzpatrick did or did not claim the privilege*". (Emphasis added.)

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* Judge Clark indicated his agreement with the holding of the District Court.

Since it was conceded that the question asked petitioner was incriminating *per se* (R. 89) and that proper circumstances existed for the assertion of a claim of Fifth Amendment privilege (R. 128), compare *Blau* v. *U. S.*, 340 U. S. 159, the issue before the Court of Appeals was whether Fitzpatrick's statement that he refused to answer on the grounds of "the First and Fifth Amendment" as well as the "First Amendment supplemented by the Fifth Amendment" constituted an assertion of the Fifth Amendment constitutional privilege.

There was no agreement within the Court of Appeals as to whether these words constitute a claim of constitutional privilege. A majority of the court concluded that the determination as to whether or not these words constituted a claim of privilege must be made by a trial court on remand of the case.

Judge Prettyman in the opinion in which Chief Judge Stevens and Judge Washington joined states that "If we were of the clear opinion that Fitzpatrick and therefore Quinn did claim the privilege and so must be acquitted, we should dispose of the matter finally here and now. Under such circumstances we should reverse a judgment of conviction. But a majority of the Court are not of that clear opinion" (R.).

The issue is thus directly presented to this Court as to whether an assertion of the "Fifth Amendment" constitutes an assertion of the constitutional privilege. In the petition for certiorari filed this day in the case of *Emspak* v. *United States*, we have set forth the reasons why this Court should grant review of this question. We adopt and incorporate herein the reasons and arguments of this point there stated.

II

Since conviction of the petitioner is barred under principles of res adjudicata and estoppel the Court of Appeals should have reversed and directed a judgment of acquittal.

The Court of Appeals has held for the first time in the proceeding that the "inquiry must be whether Fitzpatrick did or did not claim the privilege". A federal court has, however, already held that Fitzpatrick did in fact claim the constitutional privilege. Judge Morris in the district court, hearing testimony prior to the date of petitioner's trial held in an opinion specifically and directly that the witness Fitzpatrick did in fact claim the Fifth Amendment privilege. *U. S.* v. *Fitzpatrick,* 96 F. Supp. 491. Under the governing principles of *res adjudicata* and estoppel the government may not retry the issue of whether Fitzpatrick claimed the constitutional privilege. The Court of Appeals should have directed the District Court to enter a judgment of acquittal upon remand.

It has long been held by this Court that the principles of *res adjudicata* and estoppel are "as applicable to the decisions of criminal courts as to those of civil jurisdiction". *Frank* v. *Mangum,* 237 U. S. 309, 334. The Fifth Amendment provision against double jeopardy was not intended to supplant the fundamental principle of *res adjudicata* in criminal cases. *Collins* v. *Loisel,* 262 U. S. 426, 430. As this Court pointed out in *U. S.* v. *Oppenheimer,* 242 U. S. 85, 87, " * * * the proposition of the government is that the doctrine of *res adjudicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb. * * * It seems that the mere statement of the position shall be its own answer. It cannot be that the safeguards of the person, so often and so rightly men-

tioned with solemn reverence, are less than those that protect a liability in debt." * See also 25 Va. Law Review 839, *Res Judicata as a plea in criminal prosecution;* and 10 Washington Law Review 198, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases.*

Under the basic principles of estoppel by judgment the Government is barred from retrying the issue of whether Fitzpatrick asserted the privilege. The Court of Appeals has held that petitioner's criminal liability rests solely upon an inquiry into whether Fitzpatrick claimed the privilege. Where the liability of a person rests upon the act of another a valid judgment on the merits in favor of the latter binds a plaintiff as against the former. *Restatement of Judgments,* Section 99. This rule of estoppel reflects the fundamental policy that "the person against whom the rule works adversely has had his day in court". *Restatement of Judgments,* Section 99, comment a).

Where the liability of an individual rests upon a characterization of an act of another, a judgment on those facts in favor of the primary actor is a bar to litigation even though the individual asserting the bar was not a party to the original action. *Freeman on Judgments,* Section 451, p. 994. This Court has enunciated this principle in *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts,

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* Freeman on Judgments—Vol. 2, 5th Ed., Sect. 648, p. 1364:

"There is no reason why a final judgment in a criminal prosecution or proceeding should not, under proper circumstances, be given conclusive effect as an estoppel or bar. The same policy which dictates the rule in civil cases requires it in criminal cases.

"* * * The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. * * *"

when sued by the same plaintiff. See Portland Gold Mining Co. v. Straton's Independence, 158 Fed. Rep. 63, where the cases are collected." See also *New Orleans & N. E. R. R. Co.* v. *Japes*, 142 U. S. 18, 24, 27.

Under these principles the Government is estopped from retrying the issue of whether Fitzpatrick claimed the constitutional privilege. The Court of Appeals has now held that the question of petitioner's criminal liability rests upon a determination of whether in fact Fitzpatrick claimed his privilege. The Government has had its day in court on that issue and it has been decided adversely to the Government. That issue may not now be retried under the applicable decisions of this Court and the general principles of estoppel. The Court of Appeals should have directed a judgment of acquittal upon the remand.

III

A witness before a Congressional Committee must be specifically directed to answer by the Committee before he can be held in violation of Title 2, Section 192.

While the lower court held that it was not necessary for the Committee specifically to direct the witness to answer, it ruled that the Committee must clearly dispose of his objections. Since the record of the hearing indicates that the Committee in no way overruled petitioner's objections the lower court should have dismissed on remand. For all the reasons set forth in the accompanying petition for certiorari in *Emspak* v. *United States*, petitioner urges that the Court review this question. The arguments and reasons on this point set forth in the petition for certiorari in *Emspak* v. *United States*, are adopted and incorporated herein.

IV

The First Amendment protects a witness before a Congressional Committee against the compulsory disclosure of his political views and associations.

The question of the Committee for which petitioner was indicted was an inquiry into his political opinions and affiliations. For all the reasons set forth the accompanying petition for certiorari in *Emspak* v. *United States* petitioner herein urges that the Court review this question presented. The arguments and reasons on this point set forth in the petition for certiorari in *Emspak* v. *United States* are adopted and incorporated herein.

V

The ruling of the Court of Appeals affirming the denial of petitioner's request for a hearing on his motion challenging the validity of the Grand Jury is in conflict with the decision of this Court in *Dennis* v. *United States*.

There were twenty members of the indicting Grand Jury who voted on petitioner's indictment. Counsel for the Government has conceded that ten of these Grand Jurors were Government employees and two additional were wives of Government employees (R. 161). Petitioner moved under Rule 12 of the Federal Rules of Criminal Procedure for a hearing on his motion to dismiss the indictment as void in that there were not 12 duly qualified and impartial jurors. *Crowley* v. *United States*, 194 U. S. 461; *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. A. 2); 18 U. S. C. A. 554a; Rule 6(a)(2), Federal Rules of Criminal Procedure. The district court by Kirk-

land, J., denied the request for a hearing and rejected petitioner's proffer of proof in support of the motion (R. 63). The Court of Appeals upheld the district court's denial of a request for a hearing, although no majority could be found to support any one basis for this refusal. The question presented herein is identical with question four presented in the petition for certiorari in *Emspak* v. *United States*. Petitioner respectfully adopts and incorporates herein all of the reasons and arguments set forth on this point in the petition for certiorari in *Emspak* v. *United States*. For all of the reasons and arguments set forth there and incorporated herein petitioner respectfully urges that this Court grant review of this substantial question.

CONCLUSION

It is respectfully submitted for all the reasons stated herein that this petition for writ of certiorari should be granted.

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IN THE

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OCTOBER TERM, 1954

No. 8

THOMAS QUINN,

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vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 8

THOMAS QUINN,
Petitioner,
vs.
UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals reversing the judgment of conviction and remanding the case for a new trial (R. 163) is reported at 203 F. 2d 20. The opinions of Judge Kirkland (R. 63, 66) denying certain pre-trial motions filed by petitioner and 15 other individuals who were indicted for contempt of Congress appear at 95 F. Supp. 1010, 1012. The opinion of Judge Kirkland in the District Court rendered at the conclusion of the trial and holding petitioner guilty (R. 130) is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254. The petition for writ of certiorari was granted on

June 7, 1954. This case was consolidated for the purposes of argument with *Emspak* v. *United States*, No. 9, this Term, by order of the Court, 74 S. Ct. 861.

Statutes, Resolutions and Rules Involved

1. 2 U. S. C. 192, R. S. 102, as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. Rule XI(1)(q)(2) of the Rules of the House of Representatives, as amended by Section 121(b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 828, and thereafter adopted by the House of Representatives (H. Res. 5, 81st Cong., 1st Sess., 95 C. R. 10 (1949), provides:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> "The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

The language in the amendment of Rule XI by the Legislative Reorganization Act is substantially the same as the House resolution which initiated and continued the House committee in effect until the establishment of the present committee.[1]

3. Rules of Criminal Procedure:

"RULE 6. THE GRAND JURY.

(b) *Objections to Grand Jury and to Grand Jurors.*

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment."

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[1] H. Res. 282, 75th Cong., 3d Sess., 83 C. R. 7568, 7586 (1938); H. Res. 26, 76th Cong., 1st Sess., 84 C. R. 1098, 1128 (1939); H. Res. 321, 76th Cong., 3d Sess., 86 C. R. 572, 605 (1940); H. Res. 90, 77th Cong., 1st Sess., 87 C. R. 886, 899 (1941); H. Res. 420, 77th Cong., 2d Sess., 88 C. R. 2282, 2297 (1942); H. Res. 65, 78th Cong., 1st Sess., 89 C. R. 795, 810 (1943); H. Res. 5, 79th Cong., 1st Sess., 91 C. R. 10, 15 (1945); H. Res. 5, 80th Cong., 1st Sess., 93 C. R. 38 (1947).

"RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS.

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

Statement

1. The proceedings before the subcommittee of the House Committee on Un-American Activities.

The petitioner, Thomas Quinn, was an employee of the Westinghouse Electric Corporation in East Pittsburgh, Pennsylvania, and a field representative of the United Electrical, Radio and Machine Workers of America (hereafter referred to as UE or the Union), a national labor union representing employees in the electrical, radio and machine industry. He appeared pursuant to subpoena on August 11, 1949, before four members of the Committee on Un-American Activities of the House of Representatives. The hearings in which the petitioner testified were subsequently printed by the committee and are contained in a pamphlet entitled, *Hearings Regarding Communist Infiltration of Labor Unions—Part 1 (Local 601, United Electrical, Radio and Machine Workers of America, CIO, Pittsburgh, Pa.)*, 81st Cong., 1st Sess.[2]

Petitioner was subpoenaed to appear on August 10, 1949, together with Thomas J. Fitzpatrick and Frank Panzino, fellow employees in the Westinghouse East Pittsburgh plant and fellow members and officers of UE Local 601. All three UE members answered to their subpoenas on August 10, 1949, as directed. Fitzpatrick and Panzino testified before the committee that day and petitioner testified before the committee the following morning, August 11, 1949.

At the outset of the hearings counsel for the committee formally announced that the purpose of the hearing was to inquire into the question of Communist affiliation of certain members of Local 601 of the UE in connection with "the advisability of tightening present security require-

[2] These hearings constitute Government Exhibit One, and by agreement of the parties were not printed in the joint appendix in the court below.

ments in industrial plants working on certain Government contracts" (1 *Infiltration—Labor Unions* 541). After several preliminary questions as to employment and membership in the UE, Fitzpatrick, Panzino and petitioner were asked questions concerning alleged membership in the Communist Party. Fitzpatrick was the first of the three UE members to be asked these questions and declined to answer the questions by relying upon "the First and Fifth Amendments" (R. 110) as well as the "First Amendment to the Constitution supplemented by the Fifth Amendment" (R. 107). Both Panzino and petitioner, following Fitzpatrick's testimony, refused to answer the identical questions, specifically adopting as their own the grounds relied upon by Fitzpatrick.

Petitioner specifically adopted the grounds asserted by Fitzpatrick for refusing to answer the questions in the following manner (R. 97-98):

> "Mr. Tavenner. Are you now or have you ever been a member of the Communist Party?
>
> Mr. Quinn. I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the position taken by Brother Fitzpatrick yesterday.
>
> Mr. Wood. Did you hear his statement yesterday?
>
> Mr. Quinn. Yes; I did.
>
> Mr. Wood. Do you support it in its entirety?
>
> Mr. Quinn. In its entirety.
>
> Mr. Wood. Is there anything else you want to add to it?
>
> Mr. Quinn. No; I don't.
>
> Mr. Wood. Will you accept it as the expression of your views, then?

Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn. I hold that the Constitution holds sacred the rights of people——

Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

Mr. Quinn. I decline to discuss with the committee questions of that nature.

Mr. Wood. Proceed, Mr. Tavenner.

Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters, so I will ask you this: Do you know Mr. James J. Matles?

Mr. Quinn. Yes."

Petitioner, together with fifteen other individuals, was indicted for violation of 2 U. S. C. 192, by a grand jury empaneled on October 3, 1950. Of the sixteen individuals thus indicted the following, in addition to petitioner, were officials or members of the union: Thomas J. Fitzpatrick, James J. Matles, Julius Emspak, Frank Panzino, Talmadge Raley and Esther Tice. Of these seven individuals, only two, the petitioner and Julius Emspak were found guilty of contempt. The others were all subsequently acquitted by the district court.

The citations for contempt of these seven individuals resulted from three separate groups of hearings before subcommittees of the committee. The petitioner appeared together with Thomas J. Fitzpatrick and Frank Panzino at the first group of hearings. At the second group of

hearings, held on December 5 and 6, 1949, Julius Emspak and James J. Matles testified. As a result of a third Un-American Activities Committee hearing, held from July 12 to July 15, 1950, Talmadge Raley and Esther Tice were indicted.[3]

2. The Proceedings Below.

Subsequent to their testimony Fitzpatrick, Panzino and petitioner were indicted for violation of 2 U. S. C. 192, by a grand jury empaneled on October 3, 1950.[4]

Petitioner was indicted upon a single count for refusal to answer a question as to "whether he was or had ever been a member of the Communist Party" (R. 3).

On December 17, 1950, petitioner filed a motion to dismiss the indictment. The grounds of this motion included the contentions that the questions asked exceeded the bounds of legislative inquiry and were not pertinent to any question properly under inquiry by the committee; that the statutory provision invoked by the indictment inherently and as applied exceeded the bounds of the constitutional power of investigation; that this statutory provision and

---

[3] The August and December, 1949, hearings are part of a series of hearings involving UE personnel and officers which together with a hearing held in August, 1950, have been published in three consecutively numbered pamphlets entitled, *Hearings Regarding Communist Infiltration of Labor Unions.* We refer to these hearings, as we did in our brief in the *Emspak* case, as "1-3 Infiltration—Labor Unions." The hearings of July, 1950, referred to in the text, were published by the committee as *Hearings Regarding Communist Activities in the Cincinnati, Ohio, Area—Part 1.* We refer to these hearings as "Cincinnati Area."

[4] Fitzpatrick and Panzino were subsequently tried and acquitted by the District Court. In *United States* v. *Fitzpatrick*, 96 F. Supp. 491, Judge Morris upheld Fitzpatrick's statement as a valid assertion of his Fifth Amendment privilege and entered a judgment of acquittal. Similarly in *United States* v. *Panzino*, Criminal No. 1747-50, unreported, District of Columbia, the late Judge Goldsborough upheld Panzino's assertion and entered a judgment of acquittal.

House Resolution 5, inherently and as applied, are violative of the First Amendment, are unconstitutionally vague and violate the constitutional privilege against self-incrimination (R. 4).

An affidavit in support of the motion to dismiss which the government did not controvert charged that all of the these hearings in which the Union, its officers and its members were involved were characterized by an exertion of unconstitutional powers and by "objectives totally unrelated to the legitimate legislative business of the committee or the House of Representatives" (R. 7, 8). It charged that the hearing of August 9, 1949, had "the objective of interfering with and influencing the outcome of a local union election then pending in Pittsburgh, Pennsylvania" (R. 8); that the purpose and timing of this hearing were determined after consultation with and to give support to an "inner union clique" (R. 10); that the hearing which gave rise to the *Emspak* case had as its actual objective an attempt "to disclose a possible violation of Section 80 of the Criminal Code for false statements made in the so-called Taft-Hartley non-Communist affidavits" (R. 11); and that the hearings of July, 1950 (*Cincinnati Area*), were held in order to serve as a privileged forum for a series of partisan anti-labor articles, and that the entire questioning of one of the witnesses, a union member, was based upon a document subsequently admitted to be a forgery by a committee member (R. 12-14).

A second affidavit filed by the petitioner (R. 19-33) related to petitioner's claim of privilege under the Fifth Amendment, indicating that on the basis of newspapers, reports and statements of members of the committee, including the chairman, prior to the time of hearing, it was clear that among the purposes of the investigation was an inquiry into whether the petitioner was allegedly affiliated or associated with the Communist Party.

The motion further sought dismissal of the indictment, or, in the alternative, a hearing, on the ground that there were

less than twelve members of the grand jury which voted the indictment who were impartial and free from prejudice and bias against the defendant (R. 6).

Petitioner attached to the motion a series of affidavits dealing both with the claim of privilege as well as with the contention that the grand jury was illegally constituted. Thereafter, petitioner filed a supplementary affidavit attacking the qualifications of the grand jurors (R. 34).

On January 19, 1951, Judge Kirkland granted the government's motion to strike certain of the affidavits and attached exhibits dealing only with the claim of privilege upon the ground that they were not appropriate to be considered in connection with pre-trial motions. On the same day Judge Kirkland, apparently *sua sponte,* struck as legally insufficient petitioner's supplementary affidavit on the qualifications of the grand jurors (R. 34). Thereafter petitioner made an offer of proof of the allegations of fact set forth in the affidavits theretofore filed on the qualifications of the grand jurors (R. 158).

On January 26, 1951, Judge Kirkland handed down an order and opinion holding, *inter alia* that neither the circumstances recited in the motion to dismiss nor those referred to in the offer of proof with respect to the qualifications of the grand jury justified granting the relief requested by petitioner (R. 63; 95 F. Supp. 1010).

Thereafter, on January 31, 1951, Judge Kirkland filed a second opinion holding that the counts involved in the instant indictment and in several others with which he dealt simultaneously, "apparently on their face were directed to one single line of inquiry which was the specific phase of inquiry then being considered by the committee" (R. 66, 71; 95 F. Supp. 1012).

After a trial without jury the district court found the petitioner guilty, holding as a matter of law that the Fifth Amendment privilege may not be asserted by referring to

and adopting the language used by another (R. 138). Petitioner was sentenced on February 26 to a term of four to twelve months and a fine of $1,000 (R. 84). On February 27 the judgment and commitment was vacated and sentence of one year's imprisonment and $500 fine was imposed by Judge Kirkland (R. 84). On February 28 this judgment and commitment was vacated by Judge Kirkland and the original judgment reinstated (R. 85). On May 18 the judgment of February 26 was vacated by Judge Kirkland and sentence of six months' imprisonment and $500 fine was imposed (R. 85).

On January 21, 1952, an appeal from the judgment of the District Court was argued before a division of the Court of Appeals. Two months thereafter the Court of Appeals *sua sponte* ordered the appeal set down for reargument before the court *en banc* (R. 162). Pursuant to this order reargument was heard before the full court *en banc* in May, 1952. On December 19, 1952, the Court of Appeals *en banc* filed its opinions reversing the judgment of conviction and remanding the case to the district court for a new trial. There was no majority of the Court of Appeals on any one major issue in the case. The opinion of the court was rendered by Judge Prettyman for himself and Chief Judge Stephens and Judge Washington. Judge Bazelon wrote a concurring opinion in which Judge Edgerton joined. Judge Fahy wrote a separate concurring opinion. Judge Miller wrote a dissenting opinion in which Judge Proctor and Judge Clark joined.

Summary of Argument

I

Since we have already discussed in our original brief in the *Emspak* case the First Amendment issues which are presented here, we adopt the contentions there made and deal here only with certain additional matters.

The government contended that the hearings in which both petitioner and Mr. Emspak were witnesses were concerned with the danger that Communists might engage in sabotage and espionage in defense plants and that the Wood Bill (H. R. 3903) constituted the legislative subject matter of the hearings. As we shall show, the committee's resolution does not authorize an investigation into such a subject matter. But this attempt to endow the hearings with a legislative purpose must in any event fail in view of the fact that the Wood Bill does not deal with the subject matter of the hearings, Communist control of labor unions, but rather with individuals employed in defense work. The justification of the Wood Bill is unfortunate also because the bill was deemed to be unconstitutional by the Department of Justice itself. Moreover, the hearings frankly purport to deal with subversive influences in labor unions and contain no evidence at all of espionage and sabotage in defense work.

The timing of the hearings is inconsistent with their claimed purpose. The investigation of the Union which resulted in the hearing, took place prior to the reference of the Wood Bill to the committee. Although the Wood Bill was referred to the committee on March 30, 1949, the hearings were not held until August, 1949, on the eve of an important intra-union election and at the instigation of a faction within the Union.

That the purpose of the hearing was not a legislative one is shown further by the fact that the plant for which the Union was the representative was not engaged in defense work at the time the hearing was held, and by the repeated explanations of committee members during the course of the hearings that their purpose was "exposure." In addition, a hearing on the same subject matter, subsequent to that which resulted in petitioner's contempt citation, also had nothing to do with espionage and sabotage,

but was called to influence the outcome of a collective bargaining election. Finally, the House Committee on Education and Labor had fully explored the relationship of the Union to defense work and had made a report on that subject in December, 1948.

If the inquiry did have a legislative purpose, it certainly was not authorized by the resolution which has as its keystone the subject matter of propaganda and propaganda activities. The government contended in the *Emspak* case that Communists use their positions in unions for propaganda and that propaganda could possibly breed espionage and sabotage. But such contentions are not only unsupported but far-fetched. They disregard the language of the resolution and would remove all limitations on the congressional power of investigation.

The government further argued the inquiry is authorized by the resolution because a purpose of Communist propaganda might be the use of people recruited through it for industrial espionage and sabotage. But here the inquiry was not a phase of investigation into propaganda and was unrelated to that subject. Even the government could not contend that an object of Communist propaganda is espionage and sabotage. Here, too, the government has sought to expand the resolution by unacceptable techniques which would not be tolerated in any other investigative area. It should not be tolerated here because "propaganda" and "propaganda activities" are qualitatively distinct from conduct which might be undertaken by those who accept propaganda.

The fact that Congress has not expanded the committee's resolution in the face of the repeated departures from its language does not help the government. It merely emphasizes the need for this Court's intervention. This Court intervened in *United States* v. *Rumely*, 345 U. S. 41, and refused to sanction a more modest attempt to enlarge the

resolution there involved. An important consideration in the Court's limiting construction was the need to protect the First Amendment rights of the witness. That need is equally present here.

The government's view of the law invites adoption of the notion repeatedly condemned by this Court that the power of investigation even into personal and private matters is unlimited. The attempted expansion of the scope of the resolution is particularly objectionable because it is implemented by Section 192. The combination of the resolution and Section 192 imposes upon a witness before the committee the obligation to answer without a proper standard of pertinency, and turns over to the committee a penal weapon which enables it to coerce witnesses into an abandonment of their basic rights.

The government has sought to answer our objections to the scope of the resolution by argument that the words "propaganda" and "propaganda activities" are clear and definite. But the very definitions offered by the government conclusively show the impropriety of the inquiry. None of its definitions can be construed to include the matter assertedly under inquiry.

II

In declining to answer the question involved here petitioner used the expression "Fifth Amendment." Petitioner adopted as his own the reasons asserted by another witness, Mr. Fitzpatrick, who declined to answer by relying on "the First and Fifth Amendments." Since there is no issue as to whether petitioner could adopt the plea of another, the sole remaining question is whether the phrase "Fifth Amendment" constitutes an assertion of the Fifth Amendment privilege against self-incrimination. As we have already shown in the *Emspak* case, such a statement

is a sufficient assertion of the privilege and Judge Morris so held in the *Fitzpatrick* case. It should be added that the popular controversies on the scope of the privilege reinforce our contention on this point. Because the incriminating subject matter embraced petitioner's political affiliations, he naturally referred to the First Amendment and the Fifth Amendment. But the fact that he also referred to the First Amendment did not deprive him of the Fifth Amendment protection. There is historic close relationship between the two and a court must recognize this in construing the privilege. Nor did the assertion of innocence negate the invocation of the privilege. Here, too, it is historically established that the privilege is for the protection of the innocent, and is not, as the government would have it, a confession of guilt.

III

Even if we are wrong in our other contentions, the conviction of petitioner was barred under the applicable principles of *res judicata* and estoppel. A federal court had already held that Mr. Fitzpatrick did in fact claim the constitutional privilege. The government cannot retry the issue of whether Mr. Fitzpatrick claimed the constitutional privilege. The government's sole answer to this contention is that the principles of *res judicata* and collateral estoppel apply only as to the same parties in a criminal action. But the cases do not support this attempt to narrow the scope of the principle of *res judicata*.

IV

Although the committee was made aware of the reasons for petitioner's refusal to answer, it did not direct him to answer the question which gave rise to this proceeding.

Far from overruling his objection when it was made, the committee turned to another subject matter. On this record there is no evidence to show that the committee was not satisfied with his objections to the question.

V

Under this Court's ruling in *Dennis* v. *United States*, 339 U. S. 162, petitioner's motion for a hearing to investigate the qualifications of the grand jurors who indicted him was improperly denied. Conforming to the requirements of the *Dennis* case, petitioner in this case made a motion for a hearing to investigate the grand jurors' qualifications, accompanied by a detailed offer of proof and by affidavits showing the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the government's request. Of the twenty members of the grand jury voting petitioner's indictment, ten were government employees and two others were wives of government employees. The affidavit submitted by petitioner offered to show the serious extent to which their impartiality was compromised both by specific coercive measures directed against their own independence, such as Executive Order 9835, as well as by other fear-engendering measures and practices against those who might express sympathy for or tolerance of Communists. It is difficult to see how petitioner could have done more to conform to the standards laid down by this Court in the *Dennis* case.

There was disagreement among the nine lower court judges who dealt with this issue. Three judges (Clark, Miller and Proctor) read the *Dennis* case to reject as a ground for a hearing proof of the existence of a climate of fear and intimidation, such as was shown here. We submit that these views misconstrue the *Dennis* opinion, which

rejected the assertion of such a climate not because it was in itself inadequate, but because the defendant in that case had failed to establish its existence. Four concurring judges (Prettyman, Washington, Stephens and Fahy) apparently agreed with petitioner here as to the scope and meaning of the *Dennis* decision but refused to apply it to this case on the ground that there was nothing that the jury could do but indict, since the only contested issue, in their view, was the claim of constitutional privilege, a matter of defense. But these judges made it clear that there were at least two issues in the case which would require the exercise of the judgment of a grand jury. These are the issue of whether the witness was made aware that answers were required despite his objections, and the pertinency of the question to the matter under inquiry.

In view of the solid character of petitioner's showing, it was reversible error, as Judges Bazelon and Edgerton ruled, to deny petitioner a hearing.

ARGUMENT

I

House Resolution 5 as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment.

One of the questions raised by petitioner here is the contention that the resolution authorizing the committee's functioning as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment to the Constitution. This question has already been fully briefed in *Emspak* v. *United*

States, No. 9, on reargument, this Term, No. 67, last Term.[5] We, therefore, do not reargue the contentions which we have previously made but rather adopt those contentions and invite the Court to consider them here as though they were fully set out (E. Br. 28-169).[6]

It is necessary here, however, to deal with the contentions of the government, which were made in the *Emspak* case but which are equally applicable to the petitioner Quinn, concerning the matter under inquiry in both cases and the relationship of that matter to the committee's basic resolution. In its brief in the *Emspak* case the government urged that the purpose of the hearing, as described by committee counsel, was the advisability of passing legislation dealing with the danger that Communists "might be gaining a foothold in national defense plants through Communist control of unions." It stated further that "H.R. 3903 [the Wood Bill] * * * deals with this problem" and was referred to in the justification for the hearing by committee counsel. According to the government, the evil to which the hearing and the legislation addressed themselves was sabotage and espionage by Communists employed in plants engaged in national defense work[7] (G. Br. p. 52).

That the Wood Bill was merely an ill-fitting disguise for the harassment of the union and the "exposure" of individuals identified with it, is evident from the following considerations:

---

[5] The First Amendment issues in this case arise out of Question 4 of the Questions Presented and in the *Emspak* case out of Questions 5 and 6.

[6] We refer to our brief already filed in the *Emspak* case as "E. Br." and to the government's answering brief as "G. Br."

[7] The statement by committee counsel to which the Government referred in the *Emspak* case was not made in the hearing which gave rise to the *Emspak* contempt citation—no such statement of purpose was made in the course of that hearing—but was made at the outset of the hearing involving petitioner Quinn which took place some five months earlier (*Infiltration—Labor Unions* 541).

1. The Wood Bill does not deal in any sense with Communist control of labor unions, but deals rather with individuals employed in defense work and, as we have already shown, the Department of Justice itself told the House committee that the bill was unconstitutional (E. Br. pp. 167-169).

2. The hearings themselves do not purport to deal with the subject matter of the Wood Bill. Each of the three volumes published by the committee deals with union officers, personnel and representatives. The hearings are all entitled, *Hearings Regarding Communist Infiltration of Labor Unions*. There is not a syliable of evidence in any of the hearings connecting any of the individuals interrogated with sabotage or espionage.

3. The Wood Bill was referred to the committee on March 30, 1949 (95 C. R. 3546), but the investigation of Local 601 was commenced prior to that time in preparation for the hearing. Thus, one witness testified that a committee investigator talked to him "around February or March" of 1949 (1 *Infiltration—Labor Unions* 587), and another witness stated that he was interviewed on the "27th of February", 1949 (1 *Infiltration—Labor Unions* 591).

4. Although the investigation was initiated in February and March, 1949, the hearing was not held until August, 1949. It was held on the eve of the election of delegates to an important national convention of the Union and under circumstances which indicated that it was timed to influence the outcome of the election (1 *Infiltration—Labor Unions* 601). At least one member of the committee conceded that he had checked with an individual spearheading an attack upon the Union as to whether to proceed with the hearing (1 *Infiltration—Labor Unions* 605).

5. That the committee was concerned with attacking the Union and its leadership and intervening in the election

then pending, rather than in forestalling a threat to the security of defense work, is shown by the admission of the committee investigator that the Westinghouse plant, for which Local 601 was the collective bargaining representative, was not engaged in defense work at the time the hearing was held (1 *Infiltration—Labor Unions* 544).

6. We have already referred to Part 2 of the hearings in our brief in the *Emspak* case, where we show that the claimed legislative purpose was merely a makeweight for the committee's exposure operation (E. Br., pp. 162-164). As we have pointed out (E. Br. p. 7), members of the committee repeatedly in the course of the hearing stated that its purpose and function was "to expose communism."

7. All three hearings form a pattern of attack against the Union and vilification of its representatives. Part 3 of the hearings was held on August 29 and 30, 1950, four months after the legislative hearings had been held on the Wood Bill.[8] Two witnesses were called who were connected with the Union. Neither of them was a worker in a plant or, on the record, had any connection with defense work. The first witness, a free lance writer, charged that he had been subpoenaed five days prior to an election for bargaining representatives in connection with which he had been engaged by the Union (3 *Infiltration—Labor Unions* 3514).[9]

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[8] See *Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities*, March 21 to May 4, 1950.

[9] In the brief in the *Emspak* case, we point out (E. Br. p. 98) that on June 15, 1950, shortly before the scheduled election at the Sylvania Company plant in Pennsylvania, four union collective bargaining representatives active in the campaign were subpoenaed to appear before the committee on July 10. The fact that they were subpoenaed was extensively publicized. When the witnesses went to Washington they were not called until they protested. Thereafter, on August 29, two and a half months after the strategic issuance of the subpoenas, two of them gave testimony before the committee referred to in the text.

8. Finally, it is significant that the relationship of the Union to defense production had been fully explored in a series of hearings in September and October, 1948, by a special subcommittee of the House Committee on Education and Labor. See *Investigation of Communist Infiltration of UERMWA*, 80th Cong., 2d Sess. On December 14, 1948, there was published an *Interim Report* on the Union by the House Committee on Education and Labor, under the heading, *Investigation of Communist Infiltration Into Labor Unions Which Serve the Industries of the United States.* See House of Representatives, Committee Report No. 15, 80th Cong., 2d Sess.

Even if it were true that the committee was engaged in an investigation of the threat posed by Communists working in defense plants to the security of the country, and in the collection of data to demonstrate the existence of such a threat and the need for the Wood Bill, nevertheless the convictions here cannot stand. This is so because the resolution pursuant to which the inquiry was undertaken cannot possibly be construed to authorize such an inquiry. In our brief in the *Emspak* case (E. Br., pp. 36-38) we have pointed out that such terms as "un-American" and "subversive" are incapable of definition. More important, however, is the fact that the language of the resolution cannot be construed to authorize an investigation into the need to protect defense plants from espionage or sabotage. Initially, it must be remembered that propaganda and propaganda activities form the jurisdictional subject matter of the resolution. Without the subject matter of propaganda, the resolution would have no subject matter at all. It would not merely strain but torture language to construe the resolution to authorize an investigation of espionage and sabotage.

And the government's contentions in the *Emspak* case show how far language must be stretched to justify the inquiry involved here. The government contends as follows:

struggle for religious and political liberty. The principle that no man may be forced to testify against himself emerged during the heresy probes of the early inquisitions [20] and the years of struggle in England against the Star Chamber and the High Commission.[21]

The emergence of the privilege was dictated by the need to create a bulwark against political and religious oppression. It was a milestone in man's struggle against inquisitorial tyranny and was embodied in our American Constitution as a treasured protection against political or religious despotism. When Thomas Fitzpatrick said that the First Amendment was "supplemented" by the Fifth, he was enunciating in his own words a profound historical truth. Only the naive or those wilfully bent upon destruction of constitational liberties will fail to see that the wheel has now completely turned. The privilege, which was born in a struggle for political freedom, has once again become the bulwark in a struggle for the preservation of the very freedoms for which John Lilburn and Ann Hutchison suffered in earlier days. It can hardly be dismissed as a vehicle for "abuse." History cannot be erased, as embarrassing as it may be to those who chafe under its restrictions. The great and fundamental freedoms of political and religious liberty were from their origin "supplemented," reinforced and fortified by the privilege.

Dean Erwin N. Griswold of the Harvard Law School had this to say at the last winter meeting of the Massachusetts Bar Association:

> "Where matters of a man's belief or opinions or political views are essential elements in the charge, it may

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[20] See 1 Lea, *A History of the Inquisition of the Middle Ages, passim.*

[21] See, for example, Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England* (Essays in History and Political Theory in honor of Charles Howard McIlwain, 1936); Usher, *The Rise and Fall of the High Commission.*

1. An investigation into propaganda requires an inquiry not only into its contents but into the identity of its disseminators.

2. Communists use their positions in unions for propaganda purposes.

3. The issuance of propaganda has been combined with "solicitation for Party membership and for developing possible espionage and sabotage." Since these activities are "closely related" to propaganda they are "propaganda activities" (G. Br., p. 58).

Apart from the fact that these propositions are barren of support and that there is no evidence at all for the assertion that Communist propaganda—completely undescribed and unidentified by the government—breeds espionage and sabotage, this explanation completely disregards the plain language of the resolution. If this type of exegesis were sound, then it would be possible to use the investigatory power, no matter how limited its authorized scope, to penetrate the most remote and private relationships, affiliations and attitudes on the theory that the subject matter which is authorized is "combined with" or "related to" the matter which a congressional committee chooses to probe.[10]

In evaluating this justification, it must be borne in mind that the inquiry here was not ancillary to an inquiry into propaganda—as the government suggests—but was wholly divorced from it. The committee here did not deal with

[10] E.g., propaganda in favor of monopoly may be considered "closely related" to movements against improved schools, therefore a committee authorized to investigate the former can interrogate witnesses, subject to the sanctions of Section 192, about their membership in organizations devoted to the latter objective; propaganda in favor of states' rights is frequently "combined with" solicitation of individuals to become strike-breakers, therefore a resolution authorizing an investigation of the former justifies an inquiry into the latter activity; propaganda against low-cost housing is carried on by individuals with racial bias, therefore a resolution authorizing the former justifies inquiry into the latter.

the subject matter which the government claims concerned it as a part of, or as a means of illuminating, a larger whole, but as an end in itself.

The government's second argument is that even if the particular activities may not be said to be "propaganda activities" *per se*, they are an "aspect" of the "extent, character and objects" of propaganda activities and, therefore, are properly subject to inquiry. It is the government's argument that these words were intended to authorize inquiry into the *success* of the propaganda activities. More particularly, as we understand the government's argument, it is that the word "objects" in the resolution authorizes a study of the purposes sought to be accomplished by propaganda activities, which purposes "very well might include the use of people recruited through dissemination of propaganda who could be induced to collect secret industrial data and make themselves available for sabotage" (G. Br., p. 59).

It would of course be absurd to argue that the "objects" of Communist propaganda—whatever that may be—are espionage and sabotage. Propaganda is hardly a means of activating a campaign of espionage or sabotage. But it is scarcely less absurd to contend that since the purpose of propaganda is to recruit Communists and since individuals recruited through propaganda might be induced to engage in sabotage and espionage,[11] therefore the investigative authorization is not exceeded. Again, it is plain that through this House-that-Jack-built logic any congressional resolution can be converted into a dragnet.[12]

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[11] The government cites no evidence that those who become members of the Communist Party—whether through its propaganda or otherwise—have been induced to engage in espionage or "to make themselves available" for sabotage.

[12] *E.g.*, the object of monopoly propaganda is to recruit individuals who might well be induced to evade taxes, therefore a resolution covering the former justifies inquiry, subject to the sanctions of Section 192, into tax-evasion; those recruited into the anti-income

The government's chain of innuendo and speculation can hardly expand the language of the resolution and shift its aim to an area wholly different from that described by its language. The plain fact of the matter is that "propaganda" and "propaganada activities" are clearly differentiated from the acts which might be undertaken by those who accept and believe in such propaganda.[13] The basic evil toward which the resolution is addressed is the dissemination of ideas of a certain kind. The government now invites the Court to stand the resolution on its head by converting it into a resolution authorizing investigations into conduct in a field—labor—falling within the long established and well recognized jurisdiction of another House committee.

The government further argues (G. Br., p. 60) that the resolution has remained unchanged for many years. If the resolution does not in fact authorize the inquiry which the committee was assertedly engaging in, the fact that it has repeatedly violated its terms of reference cannot help it. The government's theory is that by multiplying invasions of basic rights, the committee somehow has reached a point of diminishing constitutional returns.

The entire reasoning of the government is another illustration of the way in which anti-communism becomes the universal justification for whatever repressive object the government may seek to promote. The government's position is flatly contrary to that adopted by this Court in

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tax movement, may well be developed into opponents of labor unions, therefore a resolution authorizing an investigation into the former objective warrants interrogation, subject to the sanction of Section 192, into anti-union activity; those who accept propaganda in favor of limiting immigration can frequently be induced to become active in movements limiting freedom of speech and press, therefore, a congressional committee authorized to investigate the former may cite for contempt a witness refusing to testify as to the latter.

[13] Contrary to the government's contention the thoroughness with which Congress described the area of propaganda so as to cover both the diffusion of propaganda as well as activities in conducting it shows that Congress was peculiarly concerned with this problem.

United States v. *Rumely*, 345 U. S. 41. In that case the Court rejected an attempt—much more modest than that involved here—to expand the term "lobbying activities" in order to bring the inquiry within the scope of the resolution. Here, as in the *Rumely* case, the Court is invited to strain the meaning of language in order to justify invasion of petitioner's rights under the First Amendment.

The government invites the Court not only to invade petitioner's First Amendment rights by expanding the scope of the resolution, but to revive the notion, condemned in *Kilbourn* v. *Thompson*, 103 U. S. 168, 181, that the power of investigation is unlimited.[14] It runs counter to the consistent rulings of this Court that individuals have "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect to their personal and private affairs." *Sinclair* v. *United States*, 279 U. S. 263, 292. Surely, political expression and opinion enjoy as strong a claim to privacy as any other matter.

The shotgun use of the investigative process is particularly oppressive because it is implemented by Section 192 under which petitioner was indicted. This provision enables the committee to compel answers to the constitutionally improper questions which are the hallmark of the exposure system, gives the witness no standard for determining when he may legitimately resist exposure on the ground that the question is not pertinent to the committee's resolution, and empowers the committee to hold a witness in default and send him to jail for refusing to answer any question which may occur to it, however remote from its investigative mission.

If the government is right in its argument that the inquiry was authorized by the resolution, then it cannot possibly be right in its contention that the resolution is clear and definite (G. Br., pp. 78-95). In seeking to demonstrate

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[14] On the continuing vitality of this case, see *United States* v. *Rumely*, *supra*.

that the terms "propaganda" and "propaganda activities" [15] are not vague the government offers definitions of these terms (G. Br., p. 88 and footnote 28). It assures us that as it defines "propaganda", it is a "term of knowable content" (G. Br., p. 88). But it is obvious that the definition of propaganda as offered by the government could not conceivably embrace the alleged subject matter of the inquiry. It was not an inquiry into an "organized or concerted group, effort, or movement to spread a particular doctrine or system of doctrines or principles." Nor does the subject matter deal with "propaganda activities" for it manifestly does not deal with the "mechanisms and devices of subversive propagandists which are integrally related to their propaganda" (G. Br., p. 91). The investigation had nothing whatsoever to do with "the extent, processes, and purposes by which described propaganda becomes a force in American public life and which must be reckoned with by legislation" (G. Br., p. 92, footnote 31). By assuring us that "guidance to the witness" is not "in fact absent," since, "for purposes of this case, the heart of the authorization is still only subversive propaganda instigated from a foreign country" (G. Br., p. 95), the government concedes that guidance *is* absent here.

How can it be doubted that the portion of the resolution under discussion as squared by the government with acceptable standards of definiteness speaks a wholly different

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[15] We do not deal here with the terms "un-American", "subversive" and "the principle of the form of government as guaranteed by our Constitution". The vagueness of these terms is fully treated in the *Emspak* brief (E. Br. pp. 36-42). The government states (G. Br. p. 95) that the criticism of the resolution has been directed at the terms "un-American" and "subversive" rather than at the term "propaganda". The fact is that the committee has frequently been attacked because it has ignored the "propaganda" limitations of its jurisdiction (E. Br. pp. 195 ff.). It is also worth noting that the cases which have reached the courts have either involved an outright defiance of the committee before inquiry was undertaken or a refusal to answer a question pursuant to an inquiry which might be said to have involved propaganda. See cases cited by the government (G. Br. pp. 49-50).

language from the "question under inquiry"? We insist that the inquiry was not authorized by the resolution. But if it was, then the subject matter of the resolution has no meaningful boundaries.[16]

II

A directed verdict of acquittal should be entered since the petitioner properly asserted the protection of the Fifth Amendment privilege.

Petitioner was called before the subcommittee on the third day of a three-day hearing (R. 115). He had been present on the previous day when a fellow union member, Thomas J. Fitzpatrick, testified (R. 100). The hearings were conducted in an atmosphere of haste. The witnesses were constantly urged to confine their remarks to a minimum (1 *Infiltration—Labor Unions* 600, 608, 612). Petitioner was present when Mr. Fitzpatrick and Mr. Panzino were told by the chairman that the hearing must adjourn in 30 minutes. Petitioner's own examination took place in this atmosphere.

After certain preliminary questions, he was asked whether he was or ever had been a member of the Communist Party. Petitioner immediately responded as follows (R. 97):

> "I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature."

The chairman, Mr. Wood, then questioned petitioner to ascertain whether his refusal to answer was in fact based upon the reasons given by Mr. Fitzpatrick the day before (R. 97):

> "And for those reasons do you decline to answer the question?"

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[16] And this apart from the indefiniteness of the terms "un-American" and "subversive".

Petitioner replied (R. 97):

> "I didn't say I was declining to answer the question. Before I do answer the question I should like to say that I support the position taken by Brother Fitzpatrick yesterday."

The chairman, anxious to leave no doubt that petitioner was asserting as his own the statements offered to the committee the day before by Mr. Fitzpatrick, asked petitioner (R. 97):

> "Did you hear his statement yesterday?"

to which petitioner replied:

> "Yes, I did."

Chairman Wood pressed further. He asked (R. 97):

> "Do you support it in its entirety?"

to which petitioner replied (R. 98):

> "In its entirety."

And, finally, indicating the full understanding of the committee that the witness was refusing to answer for the reasons asserted the day before by Mr. Fitzpatrick, Chairman Wood asked (R. 98):

> "Will you accept it as the expression of your views, then?"

to which petitioner replied:

> "You may. I may add I feel that I have no other choice in this matter, because the defense of the Constitution I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am."

After thus indicating in the clearest possible way that the committee knew the witness was refusing to answer

for the identical reasons asserted by Mr. Fitzpatrick the previous day, the chairman concluded (R. 98):

> "Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?"

Thereupon, petitioner sought to amplify his statement, but was cut off by the chairman:

> "You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer?"

Petitioner then declined to answer the question, based upon the reasons asserted by Mr. Fitzpatrick, and the committee accepted his declination.

> "Mr. Quinn: I decline to discuss with the committee questions of that nature.
> "Mr. Wood: Proceed, Mr. Tavenner."

It is thus clear that the committee understood that petitioner had adopted as his own the reasons asserted by Mr. Fitzpatrick the day before for refusing to answer the question asked. When he attempted to develop these reasons further, the committee cut him off, fully aware that his reasons for refusing were identical with those asserted by Mr. Fitzpatrick.

The trial court convicted petitioner solely upon the theory that one may not invoke the Fifth Amendment privilege by referring to and incorporating the assertion and position of another witness. Eight of the nine Court of Appeals judges agreed that the district court was in error in so holding, and the government so conceded before the Court of Appeals.

The Court of Appeals therefore properly concluded that the question thus posed was "whether Quinn, by adopting Fitzpatrick's statement, asserted a privilege against self-incrimination. Basically, of course, that question concerns what was in Quinn's mind. But courts cannot act upon unrevealed intentions, and so the *inquiry must be whether Fitzpatrick did or did not claim the privilege.*" (Emphasis added.)

Since it was conceded below that the question asked petitioner was incriminating *per se* (R. 89) and that proper circumstances existed for the assertion of a claim of Fifth Amendment privilege (R. 129), compare *Blau* v. *U. S.*, 340 U. S. 159, the issue before the Court of Appeals was whether Fitzpatrick's statement that he refused to answer on the grounds of "the First and Fifth Amendments," as well as the "First Amendment supplemented by the Fifth Amendment," constituted an assertion of the Fifth Amendment constitutional privilege.

There was no agreement within the Court of Appeals as to whether these words clearly constitute a claim of constitutional privilege. A majority of the court concluded that the determination as to whether or not these words constitute a claim of privilege must be made by a trial court on remand of the case. Judge Prettyman in the opinion in which Chief Judge Stephens and Judge Washington joined stated that "if we were of clear opinion that Fitzpatrick, and therefore Quinn, did claim the privilege and so must be acquitted, we should dispose of the matter finally here and now. Under such circumstances we should reverse a judgment of conviction. But a majority of the court are not of that clear opinion."

The issue is thus directly presented to this Court as to whether an assertion of the "Fifth Amendment" constitutes a clear assertion of the constitutional privilege.

It is now conceded by the government that the determinative issue involves an interpretation of the significance of

the statements of Mr. Fitzpatrick. It must be recognized that Mr. Fitzpatrick, a steward of a local union, chose his own words to express himself. At the beginning of his testimony, after pointing out that the hearing could have no possible legitimate legislative purpose, he made a statement, before any question was asked, which concluded in the following manner (R. 106-107):

> "I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.
>
> "The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment."

The committee was thus put on notice of Mr. Fitzpatrick's intention to rely upon the First and Fifth Amendments in refusing to answer certain questions. The interrogation then commenced and in response to questions concerning membership in the Communist Party or association or affiliation with Communists, Mr. Fitzpatrick refused to answer, stating (R. 110):

> "I stand on the protection of the Constitution, the First and Fifth Amendments."

Mr. Fitzpatrick was subsequently indicted under Section 192. He was brought to trial before petitioner's trial, although the opinion in his case was not handed down by

the sitting judge until after petitioner's conviction. Mr. Fitzpatrick was tried before Judge Morris in the district court. In an extensive opinion, Judge Morris found Mr. Fitzpatrick not guilty and held that his assertion of the "First Amendment * * * supplemented by the Fifth," as well as the "First and Fifth Amendments," constituted a sufficient assertion of the protection of the Fifth Amendment. Judge Morris disposed of the prosecution's arguments in the following manner (96 F. Supp. 491, 493):

> "The Fifth Amendment to the Constitution provides, among other things, that 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *.' The other provisions of that Amendment obviously have no relation to this controversy, and the provision mentioned is the one that has been construed to justify a witness in any proceeding in declining to answer any question that would tend to incriminate him, or expose him to prosecution for crime. There can be no doubt that this protection extends to a witness testifying before any judicial, congressional or administrative body of the United States Government, although, apparently, there has been misapprehension on the part of some that it does not. The use, therefore, by the defendant of the term 'Fifth Amendment' could only have reference to this provision therein, and, unless by some explicit statement that he was not claiming the protection of that provision of the Constitution, it would seem sufficient to put the committee on notice that he was asserting such claim."

Judge Morris insisted that the manner of the assertion cannot be divorced from the objective circumstances (at p. 494):

> "Where a witness, such as the defendant here, has claimed the protection of the Fifth Amendment, and that in a setting in which he has been denounced, by other witnesses testifying, as a Communist, where testimony by other witnesses, if believed, shows that he has been active in organizing and directing a Communist organization, where the statutes then in force make it a criminal offense to do such things, and where

> prosecutions have been instituted against those who are charged with doing them, it seems to me to be clear that the committee was put on ample notice that the defendant apprehended that the answers to the questions involved in this indictment would furnish information which could be used in the prosecution of him in a criminal case under existing federal statutes, and for that reason, as well as for other reasons which were not well founded, declined to answer the questions. *Blau* v. *United States*, 340 U. S. 159." [17]

Emspak v. *United States, supra,* involves, inter alia, this precise point. There too, petitioner asserted his protection under the First and Fifth Amendments, as well as the First Amendment supplemented by the Fifth Amendment. The brief of petitioner in *Emspak* fully argues the proposition that these statements represent a clear assertion of the Fifth Amendment privilege (E. Br., pp. 170-187). Since the Court consolidated *Quinn* with *Emspak* for the purposes of reargument and argument, we respectfully refer the Court to the arguments offered on this point in the *Emspak* brief, and incorporate them herein in behalf of petitioner Quinn. We will restrict ourselves here to aspects of the problem particularly relating to the *Quinn* proceeding.

In the court below, the government argued vigorously that Fitzpatrick's assertion was insufficient to constitute an effective invocation of the Fifth Amendment protection, relying upon three contentions:

1. The use of the words "Fifth Amendment" in connection with a congressional hearing does not necessarily mean the assertion of the privilege;

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[17] Frank Panzino, the third member of the Union subpoenaed together with Fitzpatrick and petitioner, used precisely the same words in asserting his Fifth Amendment protection. In *United States* v. *Panzino*, Crim. No. 1747-1950 (see Supplement I, p. 1 to *Emspak* Petition for Certiorari), Judge Goldsborough ruled that this formulation constituted an effective assertion of the Fifth Amendment privilege and, accordingly, directed a verdict of acquittal for Panzino.

2. Petitioner's joining of Fifth Amendment rights with First Amendment rights proves that petitioner was relying only upon First Amendment rights, since there is no relationship between the political rights guaranteed by the First Amendment and the privilege protected in the Fifth Amendment;
3. Petitioner's assertion of innocence indicates he was not relying upon Fifth Amendment protection, since the Fifth Amendment privilege is available only to the guilty.

We propose to deal with each of the government's contentions.

A. The use of the words "Fifth Amendment" is sufficient to invoke the protection of the privilege.

The government argues that when Mr. Fitzpatrick used the words "Fifth Amendment" as a basis for refusing to answer a question during the course of a congressional hearing, these words failed to indicate sufficiently a claim of constitutional privilege.

The words "Fifth Amendment" are household words, a part of the every-day vocabulary of all Americans. In connection with the inquisitorial conduct of congressional committees, the words "Fifth Amendment" mean only an invocation of the constitutional privilege. As Judge Morris so aptly pointed out, the only provision in the Fifth Amendment which relates to a refusal to answer, is the well-known privilege. When an individual asserts the "Fifth Amendment" before a congressional committee, no one has the slightest doubt as to which protection the witness is invoking.

The use of the words "Fifth Amendment" was clearly understood by the committee as implying an invocation of the constitutional protection. The committee did not challenge this invocation, nor did it direct petitioner or Mr. Fitzpatrick to answer the question. As a matter of fact, in the case of petitioner, the committee not only accepted the assertion, but decided to refrain from pressing further

questions of this type. If the committee had any doubt that Mr. Fitzpatrick or petitioner did in fact assert, in addition to rights under the First Amendment, their Fifth Amendment privilege, there can be no question that it would have pressed them further.

We suspect that the government will not pursue this argument too strongly before the Court, in light of the realities of the present day. To urge seriously that an assertion of the words "Fifth Amendment" is insufficient to express reliance upon the privilege would be difficult in the face of recent public statements of representatives of the government. The Attorney General of the United States not long ago gave an address which was reprinted in a leading popular magazine.[18] The caption read as follows:

> "'I refuse to testify on the ground of the Fifth Amendment.' This sentence is becoming a refrain among witnesses summoned before Government investigating bodies. And it often stops investigations in their tracks."

Thus it would seem that the Attorney General finds no difficulty in understanding that the words "Fifth Amendment" within the context of a congressional investigation mean an invocation of constitutional privilege.[19]

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[18] *U. S. News & World Report*, December 25, 1953.

[19] The use of the words "Fifth Amendment" as an invocation of privilege when asserted in the course of a congressional investigation is now universal. Even a random sampling of the most diverse sources reveals this unanimity. Thus, the *New York Times* recently reports that the Police Commissioner of the City of New York "praises Fifth Amendment as a keystone in our legal structure" *New York Times*, March 1, 1954. A university president refers to the "Fifth Amendment" in discussing the invocation of constitutional privilege. *New York Times*, March 27, 1954. Similarly, a well-known Boston attorney, in discussing the importance of the constitutional privilege in a nationally distributed, popular picture magazine, refers to the privilege consistently as the "Fifth Amendment." Joseph N. Welch, "The Lawyer's After-Thoughts," *Life*, July 26, 1954.

Should these circumstances induce the government to abandon on reargument its position that the words "Fifth Amendment" do not constitute an invocation of constitutional privilege, it would be left only with the contention that petitioner, while using the words "Fifth Amendment", affirmatively indicated in other ways that he was *disavowing* any reliance upon constitutional privilege. We turn, therefore, to a consideration of this argument.

B. Petitioner's joinder of First Amendment political rights with the Fifth Amendment privilege was well grounded in historical and present-day reality.

The government argued below that the joinder of an assertion of First Amendment rights with the Fifth Amendment indicated that Mr. Fitzpatrick and, hence, petitioner were affirmatively *disavowing* any reliance upon the constitutional privilege. This reasoning rests upon the view that in fact there is no relationship between the political rights protected by the First Amendment and the constitutional privilege contained in the Fifth Amendment. Hence, the government argues, Fitzpatrick and petitioner must have been referring to the due process clause of the Fifth Amendment (see appellee's brief in court below, at pp. 26-34).

And in the *Emspak* case (G. Br., p. 34), the government also urged that, "the privilege against self-incrimination is neither actually nor colloquially understood as a 'supplement' to the First Amendment." But it is too late to argue that the privilege against self-incrimination is not integrally related to the fundamental political liberties protected by the First Amendment.

Only recently the Attorney General himself had occasion to remind us that the constitutional privilege has its "deep roots" in the struggle for political and religious liberty among the peoples of England and America. In an address before the Law Club in Chicago in November of last year, Mr. Brownell commented:

"The privilege against self-incrimination has deep roots in early English history. The tyranny of Charles I during the years 1629 to 1640 in dealing with nonconformists, and the Star Chamber proceedings in which innocent persons were tortured into confession of crimes which they did not commit, engendered such hostility among the people that strong demands were made to end compulsory testimony as far back as 1647. By early 1650 the privilege against self-incrimination was so well established in the common law of England that it was never even thought necessary by an English Parliament to pass an act touching the matter.

"With this heritage it was not surprising that the early settlers in America fiercely resisted attempts of the governors of the royal provinces to resort to compulsory testimony for coercing confessions.

"By the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself had become fixed in the common law. It was regarded then as now, as a protection to the innocent as well as to the guilty, and an essential safeguard against unfounded and tyrannical prosecution."

Mr. Brownell's Chicago speech is better history than the government's arguments in the court below. The privilege was born out of the struggle for political and religious liberty. Its history is too well known to this Court to repeat here. See *Twining* v. *New Jersey*, 211 U. S. 78; *Boyd* v. *United States*, 116 U. S. 616; *Feldman* v. *United States*, 322 U. S. 487; *Adamson* v. *California*, 332 U.S . 46, 68; *Blau* v. *United States*, 340 U. S. 159; *Hoffman* v. *United States*, 341 U. S. 479. See 8 Wigmore, *Evidence* (3d ed.) § 2250; Boudin, *The Constitutional Privilege in Operation*, 12 Lawyers Guild Review 128 (1952).

The government's argument that the freedoms embodied in the First Amendment are not "supplemented" by the protections of the Fifth Amendment privilege disregards historical fact and present-day reality. All historians agree that the legal and spiritual sources of the constitutional privilege are to be found in the centuries-long

> be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought, and a hindrance to any government which might wish to prosecute for thoughts and opinions alone."

Today the search for political heresy has reached heights hitherto unparalleled in American history. Every section of the government machinery, legislative, executive and judicial, has been utilized as the tempo of the hunt increased. It is precisely at such a moment that the history of the constitutional privilege reasserts itself with renewed vigor. The privilege which was born as a "supplement" to political and religious liberty, once again has become in the most profound sense a "supplement" to the fundamental freedoms of the First Amendment.

C. Petitioner's assertion of innocence does not negate an invocation of the Fifth Amendment privilege.

In the courts below the government insisted that petitioner's continued assertion of innocence negated the assertion of the privilege. The government argued that the privilege is available only to the guilty. Thus, the government urged the following proposition upon the court below:

> "It is true that certain expressions are to be found in the authorities that the privilege against self-incrimination protects the innocent as well as the guilty. There can be no truth in this proposition except in the sense of a long-range philosophical view. In this sense, it is true of every oppression of the guilty that it inevitably will seep into the rights of the innocent. *But in the sense of the application of the privilege, its immediate protection is for the guilty only, because only the guilty can be incriminated*" (Appellee's brief in court below, p. 22). (Emphasis supplied.)

The notion that the Fifth Amendment privilege is available only to the guilty has become the main instrument of those who would eliminate this constitutional provision from the Bill of Rights. It is a false and harmful theory and, as this Court has pointed out, has no relation to historical reality or constitutional principle. See *Twining* v. *New Jersey*, 211 U. S. 78.[22] When this Court stated that the constitutional privilege "was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions", *Twining* v. *New Jersey, supra*, at 91, it was not expressing a "long-range philosophical view" (see appellee's brief in the court below at p. 22). It was affirmatively stating a basic constitutional fact.[23]

It must be recognized that the proposition advanced by the government in the court below has already become the rallying cry of many who would destroy the privilege by

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[22] There may be some division of opinion in the Department of Justice as to the validity of the proposition advanced by the government in the court below equating an invocation of privilege with a confession of guilt. For example, Mr. Brownell recently seems to have reaffirmed the basic principle of *Twining* in his address before the Chicago Law Club on the privilege. Mr. Brownell, echoing the words of the *Twining* decision, said, "By the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself had become fixed in the common law. It was regarded then as now, as a protection to the innocent as well as to the guilty, and an essential safeguard against unfounded and tyrannical prosecution."

[23] Of course members of the bar should be the last to forget the basic meaning of the privilege. As has recently been pointed out:

> "Lawyers, of all men, should know and understand the origin and reason for the constitutional privilege, which was to protect innocent men against the inquisitorial and manifestly unjust methods of interrogating witnesses, the temptation of prosecutors to press, browbeat and entrap them into fatal contradictions, and against the zeal of the prosecutor and public clamor for the punishment of crime" (128 *New York Law Journal* 1374 (December 4, 1952), Letter of Harold H. Corbin, Esq.).

creating the impression in the public mind that an invocation of privilege is tantamount to a confession of guilt.[24]

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[24] In the hearings of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations Senator McCarthy has repeatedly interpreted use of the Fifth Amendment as indicating that there was "something to hide." Thus in response to the statement of one witness that it was his "understanding that the Fifth Amendment of the Constitution implies no guilt as such, and it is protecting the innocent as well as the guilty," Senator McCarthy declared:

> "No. * * * Let us have it very clear when you say, 'I refuse to answer because if I were to tell the truth it would incriminate me,' you are giving the committee and the country some information. Of course, it cannot be used against you in a criminal trial." (*Army Signal Corps—Subversion and Espionage,* Part 3, pp. 118-119.)

Again, to another witness, he stated:

> "The best evidence is your standing up here and saying that 'If I tell you the truth, I will go to jail'. You cannot get better evidence." (*Ibid.*, Part 1, p. 42.)

Senator McCarthy advised still another witness:

> "You, of course, understand that, so that when you make that answer, 'I refuse to answer on the grounds of self-incrimination,' you are telling the country, in effect, that you are a traitor, that you are indulging at this time in treason against your country; that you are an espionage agent. You understand that." (*Ibid.*, Part 4, p. 152.)

He further explained:

> "It [the Fifth Amendment] provides that a criminal need not convict himself. And an innocent man does not need the Fifth Amendment. * * * If you are not a Communist, you would not incriminate yourself by saying no. If you are not a traitor, if you are not a spy for the Communists, you could not incriminate yourself by saying no." (*Ibid.*, p. 153.)

On another occasion the Senator declared:

> "* * * may I say that the best evidence that you are a Communist spy is the fact that you tell us that if you were to tell the truth, as to whether or not you were, it would incriminate you." (*Ibid.*, p. 161.)

Senator McCarthy finally reduced his interpretation of the use of the Fifth Amendment to three simple words:

> "Fifth Amendment Communist." (For applications of this phrase see for example the hearing of Brig. Gen. Ralph W.

The Dean of Harvard Law School only recently bespoke the urgency of rescuing the essence of the privilege from those who would make its use a form of public confession. In an address to the Massachusetts Bar Association he had the occasion to say:

> "Isn't the claim of the privilege the clearest sort of proof that the person who claims it is guilty of a crime? This has been asserted by high authority, but I do not believe it is true.

Zwicker, *Communist Infiltration in the Army*, Part 3, pp. 146, 147.)

Only recently Joseph N. Welch of Boston has responded to this disfigurement of the privilege:

> "There was one other matter that kept bothering me. It was certainly not an issue. It was really just a matter of phraseology. I doubt if many listeners even noticed it and perhaps my concern with it is just another proof that I am somewhat old-fashioned. I refer to the frequent use on the McCarthy side of the table, over and over again, of the words, 'Fifth Amendment Communist.' Did my ears deceive me, or is there in these words, used as they are, a connotation of opprobrium attaching to a provision of our Constitution? Are some of us beginning to wish, or being led to wish, that we had no Fifth Amendment?
>
> "Every schoolboy knows, but perhaps some of us older folk have forgotten, that the Fifth Amendment is part of the Bill of Rights, which our founding fathers added to the Constitution as insurance against a government turned arbitrary or tyrannical. It is quite an eloquent document, this Bill of Rights, and it would do us no harm to re-study its brave and brilliant words from time to time.
>
> "The Fifth Amendment is particularly noteworthy, for in just 108 words it provides that the government cannot seize private property for public use without paying for it; that no person can, in the most famous of its phrases, 'be deprived of life, liberty, or property without due process of law'; that no person can be put to trial on any major criminal charge by the whim of some vengeful public official but only by the considered action of a grand jury of his fellow citizens; and that no defendant shall be subjected to double jeopardy or forced to testify against himself.
>
> "It is this last provision, of course, to which Senator McCarthy and his staff refer. Yet any lawyer will tell you that the Fifth Amendment was never intended to serve as a con-

"Apart from its expression of our view of civilized governmental conduct, another purpose of the Fifth Amendment is to protect the innocent. But how can a man claim the privilege if he is innocent? How can a man fear he will incriminate himself if he knows he has committed no crime? Judge Magruder of our own First Circuit Court of Appeals has recently given some illustrations of this in his illuminating opinion in the *Maffie* case, decided last month.

"There is, for example, the case of the man who has killed another in self defense, or by accident, without design or fault. He has committed no crime, yet his answer to the question whether he killed the man may well incriminate him. At the very least it will in effect shift the burden of proof to him so that he will have to prove his own innocence. Indeed, the privilege against self-incrimination may well be thought of as

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fession of guilt. It was added to the Constitution to protect the innocent. It was written, history shows, for a specific and rather unpleasant reason. Our founding fathers were familiar enough with the history of the Middle Ages to know that 'justice' in that time took some peculiar forms. They knew that the formal trial of a citizen often began by placing him to torture, with someone standing by to take down that era's equivalent of a stenographic transcript of the 'confession' he made in his agony. The transcript was then piously and lugubriously produced in court as proof of the poor devil's guilt.

"The framers of the Bill of Rights were determined that this should never happen in this fair country of ours and in this spirit, which I can hardly find blameworthy, they wrote the Fifth Amendment. Now, to be sure, the Fifth Amendment has been resorted to in the intervening years by many rascals, by many guilty men and doubtless there are persons invoking it today who will one day be found guilty. But no matter who invokes the amendment, it stands in our Constitution as one of the guardians of our liberties. It is for all men to use. Guilt will have to be proved in other ways, not in a way reminiscent of the medieval dungeons.

"It would be a pity if the net effect of these long and laborious hearings, the confusion and the travail were merely to undermine our nation's faith in the document that made the nation possible. If the phrase 'Fifth Amendment Communist' has in any way eroded your faith in the Bill of Rights, read it once again, I pray you." (Joseph N. Welch, "The Lawyer's Afterthoughts," *Life*, July 26, 1954.)

a companion of our established rule that a man is innocent until he has been proved guilty."[25]

The erroneous and harmful proposition advanced by the government that the privilege is only for the guilty should be rejected in order to do justice to petitioner. It should also be rejected in order to preserve for the entire people a valuable constitutional right.

III

The conviction of the petitioner was barred under the principles of *res judicata* and estoppel.

Since the conviction of the petitioner was barred under applicable principles of *res judicata* and estoppel the Court of Appeals should have reversed and directed a judgment of acquittal rather than remanding for a new trial.

In rejecting the contention of the lower court that an individual may not adopt as his own the claim of privilege of another witness, the Court of Appeals held for the first time in the proceeding that the "inquiry must be whether Fitzpatrick did or did not claim the privilege."

A federal court had, however, already held that Mr. Fitzpatrick did in fact claim the constitutional privilege. Judge Morris in the district court, hearing testimony prior to the date of petitioner's trial, held specifically and directly that the witness Fitzpatrick did in fact claim the Fifth Amendment privilege. *United States* v. *Fitzpatrick, supra.* Under the governing principles of *res judicata* and estoppel the government may not retry the issue of whether Fitzpatrick claimed the constitutional privilege. The Court of Appeals should have directed the district court to enter a judgment of acquittal upon remand.

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[25] See in this connection *Maffie* v. *United States*, 209 F. 2d 225 (C. A. 1), referred to by Dean Griswold.

It has long been held by this Court that the principles of *res judicata* and estoppel are "as applicable to the decisions of criminal courts as to those of civil jurisdiction." *Frank* v. *Mangum*, 237 U. S. 309, 334. The Fifth Amendment provision against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases. *Collins* v. *Loisel*, 262 U. S. 426, 430. As this Court pointed out in *United States* v. *Oppenheimer*, 242 U. S. 85, 87, "* * * the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb * * *. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." [26] See also *Res Judicata As a Plea In Criminal Prosecution*, 25 Virginia L. R. 839, and *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases*, 10 Washington L. R. 198.

Under the basic principles of estoppel by judgment the government is barred from retrying the issue of whether Mr. Fitzpatrick asserted the privilege. The Court of Appeals has held that petitioner's criminal liability rests solely upon an inquiry into whether Mr. Fitzpatrick claimed the privilege. Where the liability of a person rests upon the act of another a valid judgment on the merits in favor of the latter binds a plaintiff as against the former. *Re-*

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[26] *Freeman on Judgments* (5th Ed.) § 648:

> "There is no reason why a final judgment in a criminal prosecution or proceeding should not, under proper circumstances, be given conclusive effect as an estoppel or bar. The same policy which dictates the rule in civil cases requires it in criminal cases.
>
> "* * * The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. * * *"

statement of Judgments, § 99. This rule of estoppel reflects the fundamental policy that "the person against whom the rule works adversely has had his day in court." *Restatement of Judgments*, § 99, comment (a).

Moreover, where the liability of an individual rests upon a characterization of an act of another, a judgment on those facts in favor of the primary actor is a bar to litigation even though the individual asserting the bar was not a party to the original action. *Freeman on Judgments*, § 451. This Court has enunciated this principle in *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 127:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff. See Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. 63, where the cases are collected."

See also, *New Orleans & N. E. R. Co.* v. *Jopes*, 142 U. S. 18, 24, 27.

Under these principles the government is estopped from retrying the issue of whether Mr. Fitzpatrick claimed the constitutional privilege. The Court of Appeals has now held that the question of petitioner's criminal liability rests upon a determination of whether in fact Mr. Fitzpatrick claimed his privilege. The government has had its day in court on that issue and it has been decided adversely to the government. That issue may not now be retried under the applicable decisions of this Court and the general principles of estoppel. The Court of Appeals should have directed a judgment of acquittal upon the remand.

The government has advanced only one answer to this entire argument, namely that:

> "The simple answer to this is that *res judicata* and collateral estoppel apply only as between the same par-

> ties in a criminal action. *Frank* v. *Mangum*, 237 U. S. 309. See also: *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-598." (Brief of the United States in Opposition to Petition for Certiorari, at p. 14.)[27]

This statement of the government that the principles of *res judicata* and estoppel apply only as between the same parties in a criminal action is plainly erroneous. This Court has never made any such statement. Quite to the contrary this Court has emphasized that the principles of *res judicata* are as "applicable to the decisions of criminal courts as to those of civil jurisdiction." *Frank* v. *Mangum*, *supra*, at p. 334. The Court has never said, nor in reason could it say, that only *certain* principles of *res judicata* apply to criminal proceedings.

It is apparent from the decided cases that *all* the principles of *res judicata* are equally applicable to civil or criminal proceedings. See *Frank* v. *Mangum*, *Collins* v. *Loisel*, *United States* v. *Oppenheimer*, *supra*. Hence it is clear that the rule of *Bigelow* applies equally to criminal or civil proceedings. Under the rule of *Bigelow* as we have demonstrated above, the government is barred from retrying the issue of whether Mr. Fitzpatrick claimed his privilege, since petitioner's liability is wholly dependent upon a determination of the "culpability of one exonerated in a prior suit upon the same facts." A judgment of acquittal should have been entered by the lower court.

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[27] The government intimates that the principle of *res judicata* may not apply for the additional reason that "there remains unsolved the issue as to what part of Fitzpatrick's statement petitioner adopted." Brief of the United States in Opposition to Petition for Certiorari, at p. 14. The simple answer to this argument is an examination of the record of the committee hearing. The chairman specifically asked petitioner in respect to his adoption of Mr. Fitzpatrick's statement, "Do you support it in its entirety?", to which petitioner replied, "in its entirety" (R. 97-98).

IV

A directed verdict of acquittal should have been entered since the petitioner was never specifically directed by the committee to answer the question.

While the lower court held that it was not necessary for the committee specifically to direct a witness to answer, it ruled that the witness must be made aware that the committee rejected his objection to the questions and desired answers despite the grounds he had advanced for refusing (R. 171-172). This point is discussed fully in the brief in *Emspak* v. *United States* and we incorporate the arguments and references made therein.

The record of petitioner's hearing shows beyond any doubt that the committee fully accepted his stated objections and did not make him "aware that answers were required despite his objections" (R. 171-172). The record reveals that the committee was solely interested in discovering whether petitioner adopted Mr. Fitzpatrick's statement in its entirety. Once the committee was satisfied that petitioner was in fact refusing to answer for the same grounds advanced by Mr. Fitzpatrick the day before, it abruptly terminated any further inquiry along these lines. Thus the chairman of the committee, Mr. Wood, said (R. 98):

> "You have stated your position. Having enunciated your sentiments and position, will you now answer the question whether you are now or ever have been a member of the Communist Party or do you decline to answer?"

to which petitioner replied:

> "I decline to discuss with the committee questions of that nature."

The chairman did not then overrule this objection. He did not comment on the objection. He in no way indicated

to petitioner that he or the committee were not satisfied with the objection. Quite to the contrary, he then turned to committee counsel and stated: "Proceed, Mr. Tavenner." Committee counsel then expressed the committee's full acceptance of the objections (R. 98):

> "I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters, so I will ask you this: Do you know Mr. James J. Matles?"

to which petitioner replied: "Yes."

We do not understand how it is possible to read into this record any indication to petitioner on the part of the committee that they were demanding answers despite his asserted grounds for refusal. In the light of the statements of the chairman and committee counsel it is perfectly clear that regardless of what they may have felt privately about the validity of petitioner's objections, they had concluded not to press the point. So far as the petitioner was concerned, there was no indication whatever that they were not perfectly satisfied with his objections to the question. As the lower court has interpreted the statute, it is no refusal to answer absent an indication to the witness by the committee that it desired answers to its questions despite the grounds advanced for refusing. On this record consequently there was no violation of the statute and a directed verdict of acquittal should have been entered.

V

The motion for a hearing to investigate the qualifications of the grand jury was improperly denied in the face of a detailed offer of proof and affidavits showing the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict the petitioner at the government's request.

This Court has held in *Dennis* v. *United States*, 339 U. S. 162, that government employees serving as jurors will be barred as a group for bias when circumstances are brought to the court's attention demonstrating that government employees would not be suitable jurors in a particular case.

In *Dennis*, petitioner urged that government employees should have been barred from the jury under the special circumstances of his case. The majority of this Court held that such bias must appear from the record and could not be the subject of judicial notice. The concurring opinion of Justice Reed, without which there was no majority, sharply emphasizes the holding of *Dennis* (at 172-173):

> "Mr. Justice Reed concurs in the opinion and judgment of the Court. He reads the Court's decision to mean that government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that government employees would not be suitable jurors in a particular case. Absent such a showing, however, government employees may not be barred from jury service merely because they are government employees."

The *Dennis* majority went still further and indicated the precise type of evidence which would ground an exclusion of government employees from jury duty (at 168):

> "As far as it appears, the court was willing to consider any evidence which would indicate that investigatory agencies of the government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made. Nor was there evidence with respect to the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict."

In the instant proceeding petitioner offered to prove the precise factual conditions laid down in *Dennis* as a prerequisite for barring government employees as jurors—namely the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict the defendant at the government's request.

There were twenty members of the grand jury which voted petitioner's indictment. Counsel for the government conceded that ten of these grand jurors were government employees and two others were wives of government employees (R. 161). Petitioner moved under Rule 12 of the Federal Rules of Criminal Procedure for a hearing on his motion to dismiss the indictment as void in that there were not twelve duly qualified and impartial jurors. *Crowley* v. *United States*, 194 U. S. 461; *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. A. 2), cert. denied 323 U. S. 790; 18 U. S. C. A. 554a; Rule 6(a) (2), Federal Rules of Criminal Procedure.

Petitioner submitted two affidavits (R. 15, 34) in support of his factual allegations and subsequently incorporated these affidavits in an extended offer of proof at the argument on the motion for a hearing under Rule 12 (R. 160). The district court denied the request for a hearing, struck the affidavits and rejected petitioner's offer of proof in support of the motion (R. 65).

In the affidavits submitted and in the offer of proof, petitioner offered to prove, *inter alia*, the following allegations of fact in support of the motion to dismiss the indictment:

1. Ten of the twenty grand jurors voting on the indictment were government employees (R. 34). Two other jurors were wives of government employees (R. 35).

2. Government employees at the time of the indictment and for a number of years previous were the subject of an active campaign to determine whether they were in any way sympathetic with or tolerant to Communists or any person associated with Communists or any organization charged to be a "Communist front" (R. 35).

3. At the time of the indictment, congressional leaders, congressional committees and heads of federal executive agencies were engaged in efforts to "purge" from government employment any person found to be so stigmatized (R. 36).

4. Under the President's Loyalty Order, Executive Order 9835, government employees were subject to the most intensive and searching investigation of their conduct, beliefs and associations involving in the remotest manner sympathy with persons or organizations charged to be Communistic (R. 37).

5. At the very time that the grand jury in this proceeding was considering whether to return indictments, the United States Civil Service Commission reported publicly that 280 government employees had already been dismissed as "security risks" under the loyalty program; that 13,202 employees had been the subject of a full and complete investigation by the Federal Bureau of Investigation; that 1593 employees had resigned while under FBI investigation and that 1171 employees had left their government jobs before the loyalty investigation had been completed (R. 40).

6. The actual conduct of the loyalty review boards was such as to create the distinct impression among government employees that the only way a govern-

ment employee could safeguard his livelihood was to express active hostility to any idea, person or organization which might possibly be attacked as Communist (R. 40-41).

7. Numerous articles in the public press and reports over the radio concerning the intensive nature of the loyalty investigation engendered fear and apprehension among government employees as to the retention of their jobs as a means of livelihood (R. 39).

8. The transcript of the hearing before the House Committee on Un-American Activities was before the grand jury during its deliberations. This transcript revealed to the grand jurors that the defendant was charged with contempt of the House Committee on Un-American Activities and was being investigated by the committee for alleged Communist activities (R. 16).

9. The House Committee on Un-American Activities had been extremely active in this investigation of alleged disloyalty among government employees and had publicly announced that its files and reports were used by the investigating agencies of the federal government to determine the loyalty of government employees (R. 36).

10. At the time of the grand jury hearings and a number of years prior to that, a number of congressional committees in addition to the Un-American Activities Committee, had conducted intensive investigations into the loyalty of government employees (R. 41).

11. There had been attempts at public intimidation of jurors and federal judges in proceedings involving alleged Communist activities (R. 37).

a) A resolution was introduced in Congress demanding the investigation of the presiding judge in the first Hiss trial, impugning his loyalty solely be-

cause he had attempted to exercise the functions of his office to the best of his ability (R. 37).

b) One of the jurors who refused to vote for the conviction of Hiss was required to appeal to law enforcement agencies for protection against individuals harassing him because of his vote (R. 37).

c) When the Court of Appeals for the Ninth Circuit granted bail to Harry Bridges, accused of Communist affiliation, a resolution was introduced in the Senate demanding investigation of these jurists (R. 37).

12. The Federal Bureau of Investigation had investigated and checked every federal grand juror who was a government employee. The employment of each such individual was conditioned upon a favorable report from that agency which is a subdivision of the prosecutor's office (R. 43).

13. The Department of Justice announced that the Federal Bureau of Investigation was engaged in the greatest man-hunt among federal Civil Service employees that this country has ever engaged in (R. 42).

14. Information concerning the loyalty of grand jurors who were federal employees was available to the Attorney General's office prior to the time the grand jury was sworn in (R. 43).

15. Each and every grand juror who was a government employee remained under the surveillance of the FBI during his entire employment by the government (R. 43).

16. The director of the Federal Bureau of Investigation stated publicly that whenever a federal employee was accused of "Communist affiliations", whether or not such accusations were based on fact, a full scale investigation was instituted by the Bureau (R. 42).

In addition to these specific allegations of fact set forth in the affidavits and incorporated in the offer of proof, petitioner attached a number of exhibits to the affidavits containing statements by various experts, all probative of the following propositions of fact which petitioner was prepared to prove:

1. Because of the general atmosphere of intimidation and the fear that they would be called to account for any activity or expression of opinion indicating the slightest sympathy with any person charged with being a Communist, government employees had a "low morale" (R. 45, 46).

2. Government employees as a result of this atmosphere were frightened, "upset and scared" (R. 46, 47).

3. Government employees were aware of the type of investigation made in loyalty cases and therefore assumed that any type of activity or expression of opinion which expressed sympathy for ideas or individuals charged with being Communists would provide grounds for suspicion of their own "loyalty" (R. 49, 50, 51).

4. The loyalty program was and had been used unjustly and indiscriminately as a means of depriving government employees of their jobs (R. 54).

5. The Federal Bureau of Investigation investigated every detail of the private lives, opinions, activities, reading habits and thoughts of an individual involved in a government employee loyalty check. To this end, the FBI used every technique, including wiretapping and anonymous informants (R. 56, 57).

6. As a result of these facts, prominent observers of the Washington scene concluded that "suspicion and uncertainty" beclouds government service (R. 58, 59).

These allegations and propositions of fact describe in great detail the climate of opinion at the time of the indictment among government employees in Washington to the effect that "they would jeopardize their tenure or provoke investigation," see *Dennis* v. *United States, supra,* by any conduct on their part which might be interpreted as favorable to petitioner. Under the ruling of *Dennis,* upon the proof of these allegations of fact the indictment would have to be dismissed.

A majority of the Court of Appeals sitting *en banc* upheld the denial of a hearing, although no majority could be found to support any one rationale for this refusal.[28]

Judges Clark, Miller and Proctor upheld the denial of a hearing by reading *Dennis* as foreclosing in its entirety any showing such as was set forth in petitioner's affidavits and exhibits (203 F. 2d at 56). Judges Prettyman, Stephens, Washington and Fahy accepted petitioner's reading of the import of this Court's decision in *Dennis,* but held that the decision there was not applicable to the particular fact situation in the present proceeding (at 58-60). Judges Bazelon and Edgerton dissented from the denial of a hearing on petitioner's affidavits and offer of proof (at 61).

Judges Clark, Miller and Proctor in upholding the denial of the hearing interpreted the ruling of this Court in *Dennis* in the following manner (at 56):

> "The affidavits which he [the petitioner] submitted to support his motion for hearing had as their sole basis the argument that government employees on the grand jury were incapable of reaching an unbiased decision, and they did no more than assert existence of a 'miasma of fear' so clearly rejected in the Dennis case. Without more, there was no ground upon which an order

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[28] The opinions of the Court of Appeals on this point are to be found both in *Emspak* v. *United States,* 203 F. 2d 54, as well as in the opinion in the instant case. The grand jury issue here is identical to that raised by petitioner in *Emspak* and the court below treated it as such.

for hearing might be founded, and there was no error in the denial thereof."

It is impossible to reconcile the holding of these three judges with either the majority or the concurring opinion in *Dennis*. In that case the petitioner moved for a transfer to another district on the ground that prejudice against him in the District of Columbia would prevent a fair trial. He then challenged for cause all government employees called to serve as petty jurors. A brief affidavit which was presented only in support of the transfer motion, alleged without further factual support that (1) the effect of the Executive Loyalty Order would prohibit a fair trial, (2) that the functioning of the House Committee on Un-American Activities might prevent a not guilty verdict, and (3) that false rumors in the press had discredited the defendant, prejudicing his right to a fair trial. No hearing was requested or offer of proof made in connection with the transfer motion.

The majority opinion in *Dennis* ruled that the Court will not take judicial notice of an asserted "miasma of fear" intimidating government employees from exercising free and impartial judgment as grand jurors in cases involving political offenses. The crux of the majority opinion in *Dennis* is the conclusion that the petitioner there had failed to establish the existence of such a climate or atmosphere. This conclusion is underlined by the majority's approving reference to "any evidence which would indicate that investigatory agencies of the government had recognized in the past or would take cognizance in the future of a vote of acquittal * * *" or evidence "with respect to the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict." *Dennis* v. *United States*, *supra*, at 168. The majority of the Court thus did not reject as a standard the existence of a "miasma of fear" but merely declined a request "that judicial notice be taken of an aura of surveillance and intimidation which is said to exist in

the District because of Executive Order 9835, outstanding at the time of the trial." *Dennis* v. *United States, supra,* at 169.

The concurring opinion of Mr. Justice Reed emphasizes the import of the majority opinion. Mr. Justice Reed read the majority to mean "that government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court the government employees would not be suitable jurors in a particular case. Absent such a showing, however, government employees may not be barred from jury service merely because they are government employees." *Dennis* v. *United States, supra,* at 172, 173.

In light of the *Dennis* opinions, it is impossible to hold that this Court has foreclosed any inquiry into an atmosphere of fear resulting in partiality and intimidation on the part of federal employees acting as jurors in the District of Columbia. Quite to the contrary, six of the seven justices who participated in the *Dennis* case were agreed that such an opportunity must be available to a defendant in a criminal proceeding.[29] The only disagreement between the dissenting justices and the majority and concurring justices was as to whether the record then before the Court was sufficient to permit a finding that such an atmosphere of fear among government employees did in fact exist.

That problem is not present here. Petitioner, through his offer of proof and affidavits, has set forth in great detail allegations of fact which would, in the words of the *Dennis* majority, "indicate that investigatory agencies of the government had recognized in the past or would take cognizance in the future of a vote of acquittal" as well as a vast amount of evidence tending to show, again in the

[29] The concurring opinion of Justice Jackson in *Dennis* is based upon the view that the decision of the Court in *Frazier* v. *United States*, 335 U. S. 497 should be reversed.

words of the *Dennis* majority, "a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict." Petitioner, here, has taken the very steps which the *Dennis* majority authorizes. Under the *Dennis* decision it was clear error to deny petitioner an opportunity to make his proof in a proper hearing.

The concurring Judges, Prettyman, Washington, Chief Judge Stephens and Fahy, did not read the *Dennis* case as did Judges Clark, Miller and Proctor. These members of the Court of Appeals assumed for the purposes of this case that the concurring opinion of Mr. Justice Reed in *Dennis* is "an accurate summation of the opinion of the Court" and summarized the rule of *Dennis* in the following manner (203 F. 2d at 58): "The question before us is whether circumstances were brought to the trial court's attention which demonstrated that government employees would not be suitable grand jurors in the particular case."

The concurring judges did not hold that petitioner's offer of proof was insufficient in law. To the contrary, they indicated that such an offer might have been sufficient in "other cases and other circumstances" (at 59). These members of the lower court based their affirmance on the assumption that in *this particular case* there was no area of discretion for the grand jury. Under their view the grand jury could do nothing but indict since it was not called upon to evaluate the probabilities of a "doubtful *prima facie* case or of a charge in the realm of opinion or controversy" (at 60) and since the only contested issue assertedly before the grand jury was the claim of constitutional privilege which was a matter of "defense of justification" (at 60).

But this conclusion of Judges Prettyman, Washington and Chief Judge Stephens, joined in in this respect by Judge Fahy in *Emspak*, is in conflict with their opinions in this case. Judges Prettyman, Washington and Chief Judge Stephens held that "the deliberate and intential

character of the refusal is an element of the offense, to be determined from all the circumstances by the trier of the facts" and pointed out in amplification that "to constitute an offense, refusal to answer must be intentional" and that "it must appear that [the defendant] was aware of the intention of his inquirer that answers were required despite his objections" (R. 171-172). We assume, for the purpose of argument, that the discussion of Judges Prettyman, Washington and Chief Judge Stephens represents the opinion of the lower court on the question of "direction." To hold that a *prima facie* case of violation of the statute is present, a grand jury must therefore consider whether it appears from the evidence that the witness "was aware of the intention of his inquirer that answers were required despite his objections." Thus the lower court held that this is not a matter of "defense of justification," but rather *"an element of the offense."* Hence this is an issue which the grand jury would have had to consider in deciding whether there was a *"prima facie"* case of violation of statute.

It seems clear from the very opinion of these judges that there *was* in fact an area of discretion for the grand jury. The grand jury might have concluded on the basis of the record that the petitioner was not "aware of the intention of his inquirer that answers were required despite his objections." That this was a reasonably possible conclusion for an impartial trier to arrive at is evidenced by the remand in this case which instructs the trial court to consider this very point. See also *Keeney* v. *United States*, decided by the court below, August 26, 1954 (opinion of Judge Prettyman).

A subsequent decision of the Court of Appeals, *Bowers* v. *United States*, 202 F. 2d 447, further emphasizes the inherent conflict in the opinion of the concurring judges. In *Bowers*, the Court of Appeals held that pertinency is a material ingredient of an offense under the contempt statute. If pertinency is a material ingredient of the

offense, this, too, must be shown to the grand jury in demonstrating the existence of a *prima facie* case. At a minimum the grand jury which considered petitioner's indictment had before it two issues involving the exercise of discretion: (1) the presence or absence of an awareness of the intention of the inquirer that answers were required despite objections, and (2) the presence or absence of the ingredient of pertinency.

This discretion of the grand jury in a situation impregnated with the issue of "communism" and involving a congressional investigation into "Communist infiltration" in labor unions, was exercised in a manner detrimental to the right of petitioner to an impartial determination by the grand jury. This the petitioner offered to and was ready to prove at an appropriate hearing which he requested.

The government argued below that the refusal to grant a hearing on petitioner's motion directed to the qualifications of the grand jury was within the area of discretion of the trial judge. This is not the law. A trial judge has, of course, certain latitude in disposing of objections raised to an indicting grand jury. Where the grounds advanced in support of a motion to quash an indictment are clearly insufficient in law, there is no requirement that a hearing be granted on such a motion. *United States* v. *Rintelen*, 235 Fed. 787 (D. C. N. Y.). However, a refusal to hear evidence offered in support of legally sufficient allegations challenging a grand or petty jury is always reversible error. *Carter* v. *Texas*, 177 U. S. 442; *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*, 188 U. S. 519; *Glasser* v. *United States*, 315 U. S. 60, 87; *Morford* v. *United States*, 339 U. S. 258. Similarly, the refusal of an offer of proof made in open court in support of a motion to dismiss an indictment for improper constitution of a grand or petty jury is likewise reversible error. *Carter* v. *Texas*, *supra*; *Brownfield* v. *South Carolina*, 189 U. S. 426.

Under the rule of *Dennis*, petitioner's allegations were clearly legally sufficient and as Judge Bazelon pointed out in his opinion below they "were supported by affidavits of circumstances which cannot be said to be frivolous" (R. 184). As Judge Bazelon further reminded, the question posed was not whether petitioner will ultimately be successful in proving his allegations or securing the relief he seeks. The single issue here presented is whether the Court will now enforce its firm assurances in *Dennis* that "the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." *Dennis* v. *United States, supra,* at 168.

Petitioner's motion involves the impact of certain recognized facts upon the operation of the judicial system. This is an area which this Court has both the right and duty to supervise. The Court cannot ignore the serious impact which the entire contemporary pattern of repressive measures has made upon the administration of justice. The Loyalty Order, in particular, has seriously compromised the right to a fair trial in the District of Columbia. It has created a problem which urgently calls for this Court's correction.[30]

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[30] In addition to the authorities set forth in the affidavits and offer of proof, recent studies emphasize the magnitude of the question:

Two leading social scientists, Marie Jahoda and Stuart W. Cook, respectively Associate Professor of Social Psychology and Chairman of the Graduate Psychology Department of New York University, have investigated the social-psychological consequences of loyalty and security measures on government servants. *Security Measures and Freedom of Thought, An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 Yale L. J. 295 (1952). They conducted interviews with fifteen faculty members from different universities and with seventy federal employees in Washington, D. C. from more than a dozen different agencies ranging in rank from a junior professional to senior officer (p. 296). The investigators found that "the scope of the inquiry could not be limited to the study of the impact of the official departmental loyalty and security procedures, as had originally been planned," since in the minds of those questioned these procedures were "part of a much larger inter-

The government sought below to avoid the impact of the decision of this Court in *Dennis* by suggesting that partiality in the grand jury was perhaps not "*per se* disqualifying" (Brief for Appellee, *Emspak* v. *United States*, p. 26). Moreover, the government suggested that perhaps petitioner had no constitutional right to an impartial grand jury in any event. As Judge Bazelon pointed out below "what the government is proposing is *pro tanto* repeal of

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related complex of formal and informal measures toward the same end" (p. 300).

As the investigators reported:

> "There is hardly a respondent who did not sooner or later mention the name of the Senator from Wisconsin. * * *
>
> "The Hatch, McCarran and Smith Acts were brought into the field of discussions. Speeches in Congress, the role and function of the F.B.I., departmental routine checks, and special investigations; security procedures and loyalty procedures; state and municipal investigating programs; the un-American Activities Committee; the procedures of broadcasting companies and of private industry; the activities of various private organizations self-appointed to improve the Attorney General's list of suspect organizations—they are all mentioned as integral parts of the security measures to which the respondents addressed their comments" (pp. 300-301).

The study pointed out:

> "To perceive all security measures—official and unofficial ones—as inevitably linked with each other means, of course, that people respond not to one singled out for inquiry, but to the whole situation" (p. 301).

Professors Jahoda and Cook found that this "situation" had created an all-pervasive atmosphere:

> "The security situation thus presents to our respondents a complex system of formal and informal social controls in which they discern a variety of motives. How central is this situation in the lives of the persons who are or may be affected by it? Is it an isolated aspect of their experience to which they turn attention only when asked to do so in the course of an interview or when it touches them directly through some immediate issue? Or does it pervade large areas of their thinking and behavior, even when it is not directly in the focus of attention?
>
> "On the basis of the exploratory interviews, we suggest for more thorough inquiry the hypothesis that the security

the Fifth Amendment's assurance of 'a presentment or indictment of a grand jury.'"

A grand jury paralyzed by fear and unable to exercise its free judgment would violate a defendant's "federal constitutional right to a fair and impartial grand jury." *Cassell* v. *Texas*, 339 U. S. 282. This Court has in the past noted that "the grand jury is as valuable as ever in securing * * * 'individual citizens from an open and public accu-

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situation, perceived in the global fashion we have described, is a very salient issue for federal employees in Washington; that it is not confined to an intellectual concern with the problem but pervades the entire atmosphere; in other words, that the security issue has become part of the prevalent climate of thought, and underlies in the form of tacit assumptions many aspects of every day behavior. This saliance is furthermore evident for persons holding very diverse political views" (pp. 303-304).

To exist in this changed climate, the survey indicated:

"The codes of behavior to which our respondents adhere or to which they fear they must adhere are now more specific and concrete than the traditional American way of life would lead one to assume. Apparently these traditional standards for behavior are deemed by many respondents to be inappropriate in the present situation" (p. 306).

Concretely, this was manifested in, for example, "an assumption that a federal employee should avoid not only what the government explicitly vetoes but also what the government does not explicitly approve" (p. 306); precautions such as being "careful in political conversations with strangers" (p. 308); a feeling that "governmental decisions should not be questioned as one did before, but 'what's handed down' should be accepted"; and the idea that "federal employees keep out of discussion on any controversial subject" (p. 309).

Another consequence the investigators found was that "the distinction between *unfounded* and *founded* suspicion is easily blurred" (p. 315), and the growing belief that "where there is smoke, there is fire" (p. 317).

The "essential import" of the "institutionalized pressures enforcing conformity to the new climate of thought," the investigators sum up, "is that the hazards of *being investigated*—even if one is subsequently cleared—are so great that individuals are induced to limit their behavior by avoiding (or trying to avoid) anything that might conceivably arouse anyone's suspicion and thus lead to charges and an investigation" (p. 318).

sation of crime and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury, and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions.'" *Ex parte Bain*, 121 U. S. 1. In *Ex parte Bain, supra*, the Court went on to quote approvingly Justice Field in his charge to the grand jury, 2 Sawyer 667:

> "[The grand jury] is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds but also as a means of protecting the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion or private enmity."

Moreover, the grand jury is both an instrument of great importance to a democratic system of justice and a source of great power. As Judge Bazelon warned below (R. 177):

> "Delegation of such sweeping powers compels a balancing caution in the selection of those who exercise them. Freedom of will and conscience should be a minimal requisite in their selection."

The proper functioning of the grand jury system is not a matter of individual concern. As this Court has pointed out, where a grand jury is not properly constituted "reversible error does not depend on a showing of prejudice in an individual case * * *. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U. S. 187, 195. As Judge Bazelon stated, petitioner's challenge to this grand jury "touches our democratic insistence on the fair administration of law." The rule of this Court in *Dennis*, as well as insistence upon impartial enforcement of constitutional guarantees, required at a minimum granting petitioner the hearing prayed for.

CONCLUSION

For all of the above reasons the conviction of petitioner should be reversed with instructions for his acquittal and the indictment dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1952

No. [redacted] 66

THOMAS QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the District Court denying petitioner's motions to dismiss the indictment (R. 63-78) are reported at 95 F. Supp. 1010, 1012. The majority, concurring and dissenting opinions of the Court of Appeals sitting *en banc* (R. 163-212) are reported at 203 F. 2d 20.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952, and a petition for a rehearing *en banc* was denied on April 13, 1953 (R.

213, 218). The petition for a writ of certiorari was filed on May 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Court of Appeals should have directed an acquittal instead of remanding the instant case for a new trial on the issues of (1) whether petitioner sufficiently claimed his privilege against self-incrimination when he adopted statements made by another witness the preceding day to the same Congressional committee; and (2) whether petitioner intended to refuse to answer the question as charged.

2. Whether further proceedings in the instant case are precluded under the principles of *res judicata* and estoppel because of the acquittal of the other witness whose remarks petitioner adopted by reference.

3. Whether a sufficient showing was made to entitle petitioner to a dismissal of the indictment, or to a hearing to investigate the qualifications of the grand jurors, when it was shown that ten of the twenty members of the grand jury were government employees and that two more were wives of government employees, and various data were offered purporting to show that government employees at the time of the indictment could not be impartial with respect to a person alleged to be a Communist.

4. Whether, under the First Amendment, a Congressional committee, duly authorized to investi-

gate security precautions to prevent Communist union officials from gaining access to plants doing secret defense work, may question an official of a trade union with a substantial membership in such plants as to whether he was a member of the Communist Party.

STATUTE, RULE AND RESOLUTION INVOLVED

The pertinent parts of the statute, Rule of Criminal Procedure and House Resolution involved are set forth in our brief in opposition in the companion case of *Emspak* v. *United States,* No. 796, O.T. 1952, pp. 3-4, 5-6.

STATEMENT

After a trial without a jury petitioner was found guilty under a one-count indictment for refusing, in violation of 2 U.S.C. 192, to answer a question as to whether he was or ever had been a member of the Communist Party, asked by a subcommittee of the Committee on Un-American Activities of the House of Representatives. He was sentenced to six month's imprisonment and fined $500 (R. 81). The facts pertaining to his appearance before the sub-committee may be summarized as follows:

On August 11, 1949, petitioner appeared pursuant to subpoena before a duly organized subcommittee of the Committee on Un-American Activities which was then engaged in investigating Communist infiltration of certain labor unions connected with defense production, particularly Local 601 of the United Electrical, Radio and Machine

Workers of America, CIO, a union affiliated with the Westinghouse Electrical Company which had been engaged in defense production, and which in the past had performed work for the Atomic Energy Commission (R. 92-94, 96, 115, 121). The object of the investigation was to secure information relevant to a pending bill in Congress designed to impose security requirements in those industrial plants working under Government contract (R. 115-116).

Although petitioner was not represented by an attorney at the counsel table (R. 93), he stated that he had an attorney close at hand if he needed him (R. 94, 101, 118). After he had stated that he was a field organizer for the International Union of the United Electrical Radio and Machine Workers and a member of Local 601 of that union, he was asked the question upon which the indictment is based, i.e., whether he was or had been a member of the Communist Party. The following colloquy thereafter occurred (R. 97-98):

> Mr. Quinn. I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support

the position taken by Brother Fitzpatrick yesterday.

Mr. Wood. Did you hear his statement yesterday?

Mr. Quinn. Yes; I did.

Mr. Wood. Do you support it in its entirety?

Mr. Quinn. In its entirety.

Mr. Wood. Is there anything else you want to add to it?

Mr. Quinn. No; I don't.

Mr. Wood. Will you accept it as the expression of your views, then?

Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn. I hold that the Constitution holds sacred the rights of people——

Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

Mr. Quinn. I decline to discuss with the committee questions of that nature.

The record shows that on the day preceding that of the questioning of Quinn, the subcommittee had questioned Thomas J. Fitzpatrick, chief steward of Local 601. Fitzpatrick, before being questioned. was allowed to make an extended statement which was highly critical of the committee, and alleged, in effect, that the committee was attempting to smear the local union, that its investigation was "rigged by a Jesuit priest", and that its purpose was to influence union elections and wage negotiations with the Westinghouse Company (R. 103-106). His opening statement, made before any question was asked, concludes (R. 106-107):

> I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.
>
> The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

Mr. Wood. What is it?

Mr. Fitzpatrick. The right of the people guaranteed by the Constitution.

Fitzpatrick on being questioned was asked by committee counsel whether he was or ever had been a member of the Communist Party. He responded as follows (R. 107-108):

Mr. Fitzpatrick. Mr. Chairman, in my opening remarks I gave quite a bit of my attitude on this question. I say that this committee has no right to pry into my mind.

Mr. Wood. We are not concerned with your opinion of the committee. We have asked you a simple question. Do you want to answer it or not?

Mr. Fitzpatrick. I am answering it, Mr. Chairman.

Mr. Wood. We don't have the time for a long dissertation.

Mr. Fitzpatrick. I think I have a right to answer it in my own way.

Mr. Wood. The question can be answered "Yes" or "No," or you can decline to answer it.

Mr. Fitzpatrick. Being just a common workingman, I will answer it in my own words. I don't think the committee has the right to dictate the choice of my words in answering it.

Mr. Wood. We are not attempting to do that. You may answer or decline to answer.

Mr. Fitzpatrick. I will answer the question. The Constitution guarantees the right to me and every other citizen to have beliefs, whether they are popular or unpopular, and

to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Constitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here.

Mr. Wood. Now will you answer the question?

Mr. Fitzpatrick. I have answered the question.

Thereafter Fitzpatrick kept repeating that he was not refusing to answer the question but that he had answered it. On being asked similar questions he repeated that he had already answered them by his statements already given (R. 108-114). On one occasion he was asked whether he had furnished one Copeland an application blank for the Communist Party, and his answer was as follows (R. 110):

Mr. Fitzpatrick. Mr. Chairman, do I have to give you my answer again?

Mr. Wood. I just want to know whether you did that one thing.

Mr. Fitzpatrick. I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.

Mr. Wood. And for the reason do you decline to answer the question?

Mr. Fitzpatrick. I stand on the protection of the Constitution, the First and Fifth Amendments.

Mr. Wood. And for those reasons decline to answer the question further?

> Mr. Fitzpatrick. I have answered the question.

Fitzpatrick said that he would answer any question regarding any acts that he had done, but would give no answer to any question seeking to elicit his beliefs, in the following colloquies (R. 111, 114):

> Mr. Fitzpatrick. I came here and I stated that if you have any questions about any actions that I have committed, I will answer. So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation.
>
> * * * * *
>
> Mr. Moulder. You say you will answer questions about any acts you have committed.
>
> Mr. Fitzpatrick. That is right.
>
> Mr. Moulder. Don't you feel the Congress of the United States has a right to interrogate people as to their beliefs and what is their hope for the future in those beliefs?
>
> Mr. Fitzpatrick. I think the Congress has no such rights, and I think if you will read the Constitution you will see that. Do we have thought control in the United States now? Are you going to convict people on thinking? I think maybe you fellows should read that Constitution.

The Court of Appeals sitting *en banc* reversed the judgment of the District Court and remanded the case for a new trial (R. 162-213). Its holding

was based principally on the fact that, in considering whether Quinn had validly claimed a personal privilege against self-incrimination by reference to a position that Fitzpatrick had taken the day before, the trial judge had held that he could not do so as a matter of law, regardless of the factual considerations involved.[1] The majority held that no specific formula is required to claim the privilege as a matter of law, and that, where a witness makes an equivocal statement, a question of fact, or at least a mixed question of law and fact, is presented which must be resolved in the first instance by the trial judge in the light of the factual setting of the particular case. In this case, the court held that the sufficiency of Quinn's claim rested on the sufficiency of Fitzpatrick's claim made the day before which was not considered by the trial judge. The court refused to consider this question as an initial proposition and held that in a new trial the trial judge would have to consider (R. 168) "* * * whether Fitzpatrick's statement, in full text and context, related only to the claim of the rights of free speech and thought under the First Amendment, or whether an auditor could detect an intention to claim the privilege against self-incrimination, protected by the Fifth."

The Court rejected the contention that, before a

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[1] The trial court in addressing himself to this issue, said (R. 138):

> On that, this Court finds as a matter of law that one may not. Since the privilege is personal, the defendant must assert it himself, since another may not know what is in a defendant's mind at the time he is called before the Congress to testify on pertinent matters, to proper inquiry, and therefore, one may not, by reference, assert that privilege.

witness may be held in contempt for failing to answer a question, he must be specifically directed to answer, citing its decision in *Emspak* v. *United States*, 203 F. 2d 54, handed down the same day. It observed, however, that a factual question as to whether petitioner had the intent to refuse to answer the question, or whether he thought the committee had abandoned the question, remained unresolved, and should be passed on by the trial judge on a new trial in accordance with its holding in *Bart* v. *United States*, 203 F. 2d 45, also handed down the same day.

The majority rejected, as it had in the companion *Emspak* case (203 F. 2d at p. 56), the contention that petitioner should have been afforded a hearing on his motion to dismiss the indictment for the reason that ten members of the grand jury were Government employees, and two, the wives of Government employees. Judges Bazelon and Edgerton thought that petitioner was entitled to a hearing on the grand jury issue.

Judge Miller, in a dissenting opinion joined by Judges Proctor and Clark (203 F. 2d at pp. 38-45), was of the view that the trial court did not rest its holding only on the premise that the privilege could not be claimed by reference, but also on a finding that Fitzpatrick's prior statement was itself insufficient to claim the privilege. He thus saw no reason to remand the case for a new trial.

ARGUMENT

1. Petitioner contends that the Court of Appeals erred in remanding the case for a new trial on the issues of (1) "* * * whether Quinn claimed the

privilege [against self-incrimination] by adopting the statement made by Fitzpatrick" (the witness who had testified the day before), and (2) on the issue as to whether he had the intent to refuse to answer or thought the question abandoned by the subcommittee. His present petition is premised on the assumption that the Court of Appeals was bound to direct an acquittal regardless of whether the trial court had resolved these issues on the trial of the case.

We submit that whether or not the Court of Appeals had the power to pass on these crucial issues affecting guilt or innocence in a criminal case as an initial proposition, it clearly had discretion not to do so, and to remand the case for retrial. Even in cases where the evidence is insufficient to make out a *prima facie* case, the Court of Appeals is not bound to direct an acquittal but may properly remand for a new trial. *Bryan* v. *United States*, 338 U.S. 552. Its discretion in cases where there exist unresolved issues of fact would clearly be no less extensive.

Since neither court below has passed on the issues of fact for which the case has been remanded, the present application to this Court for a judgment of acquittal is patently premature. This Court has repeatedly indicated that the proper forum for initial determinations of disputed issues of law and fact is the trial court. *Mason* v. *United States*, 244 U.S. 362, 366; *Vajtauer* v. *Commissioner*, 273 U.S. 103, 113. See also: *Bryan* v. *United States*, *supra* (338 U.S. at pp. 558-559);

Cone v. *West Virginia Paper Co.*, 330 U.S. 212, 215-216. Such is the case here. Whether petitioner properly apprised the subcommittee of a claim of privilege, in terms which would convey to them a meaning that he intended to do so, and whether he could have believed, in the particular circumstances of this case, that the subcommittee had abandoned the question and that he was no longer obligated to answer it, are issues which are not resolvable by mechanical reference to the record, and their proper determination is in the trial court in the first instance. On a new trial the statements of Fitzpatrick, which petitioner adopted by reference, can be examined, and it can be determined if they might have connoted to an auditor the fact that that witness was making a claim of privilege, or whether his general criticism of the methods and motives of the subcommittee was no more than that. It can also be determined, assuming that Fitzpatrick made a statement in his extended discourse which constitutes a specific claim of privilege, whether the subcommittee was properly apprised that petitioner was adopting that specific claim, or whether the subcommittee would have thought he was only adopting the general statements made by Fitzpatrick.[2] Finally the crucial issue of whether petitioner's refusal was deliberate, or based on an erroneous assumption

[2] For example, Fitzpatrick stated his objections to answering questions before being asked any, including a blanket statement that (R. 107) "This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment." Whether Quinn intended to adopt this or some other part of the critical remarks, is certainly not clear in the record.

of abandonment, can also be resolved in the light of all the pertinent facts.

2. Petitioner argues that his conviction is precluded under the principles of *res judicata* and estoppel, because the district court in another case found that Fitzpatrick, whose statement petitioner adopted by reference, had sufficiently apprised the subcommittee of his intent to rely on the privilege. *United States* v. *Fitzpatrick*, 96 F. Supp. 491. The simple answer to this is that *res judicata* and collateral estoppel apply only as between the same parties in a criminal action. *Frank* v. *Mangum*, 237 U.S. 309. See also: *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598. Moreover, as noted above, there remains unresolved the issue as to what part of Fitzpatrick's statement petitioner adopted.

3. The arguments based on the alleged infringement of the First Amendment and the alleged disqualification of government employees as grand jurors are discussed in the Government's brief in *Emspak* v. *United States*, No. 796, 1952 Term, to which the Court is respectfully referred.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

THOMAS QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Appeals (R. 163-212) are reported at 203 F. 2d 20. The opinions of the District Court denying petitioner's motions to dismiss the indictment (R. 63-78) are reported at 95 F Supp. 1010, 1012. The oral opinion of the District Court at the close of the trial (R. 130-139) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952, and a petition for re-

hearing *en banc* was denied on April 13, 1953 (R. 213, 213). The petition for a writ of certiorari was filed on May 13, 1953, and granted on June 7, 1954 (R. 219). The jurisdiction of this Court rests on 28 U. S. C. 1254(1). See also former Rule 37(b)(2) and Rule 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Court of Appeals should have directed an acquittal instead of remanding for a new trial on the issue of whether petitioner sufficiently claimed the privilege against self-incrimination when he adopted statements made by another witness who had appeared before the same Congressional committee the preceding day.

2. Whether under principles of *res judicata* and collateral estoppel, Fitzpatrick's acquittal on the ground that his statement, later adopted by petitioner, constituted an assertion of the privilege against self-incrimination precludes an independent determination in this case of whether petitioner claimed the privilege.

3. Whether the Court of Appeals should have directed an acquittal instead of remanding for a new trial on the issue of whether petitioner's refusal to answer was with knowledge that the Committee was requiring him to answer.

4. The twenty grand jurors who concurred in finding the indictment included ten government employees and two wives of government employees. The question presented is whether petitioner made a sufficient showing of bias on the part of these

twelve grand jurors to entitle him to dismissal of the indictment or to a hearing on the issue.

5. Whether the Resolution creating and defining the powers of the House Committee on Un-American Activities authorized the Committee to ask petitioner whether he was a past or present member of the Communist Party; and, if it did, whether the Resolution, as thus construed, is unconstitutional, in that (a) it exceeds the investigatory or legislative power of Congress, (b) it is too vague and indefinite, or (c) it abridges rights secured to petitioner by the First Amendment.

STATUTES INVOLVED

The relevant statutes, resolutions, and rules are set out in the Brief for the United States in *Emspak* v. *United States*, No. 9, O. T. 1954, with the exception of the pertinent portions of Rule 6 of the Federal Rules of Criminal Procedure, which are as follows:

> Rule 6. The Grand Jury.
>
> * * * * *
>
> (b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.
>
> * * * * *
>
> (2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more

members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) FOREMAN AND DEPUTY FOREMAN.

* * * The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. * * *

(d) WHO MAY BE PRESENT. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose

matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant has been held to answer and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

STATEMENT

On November 20, 1950, the petitioner, Thomas Quinn, was indicted by a grand jury of the United States District Court for the District of Columbia, for having wilfully refused to answer the question "whether he then was or had ever been a member

of the Communist Party" before a duly created subcommittee of the Committee on Un-American Activities of the House of Representatives, in violation of the provisions of 2 U. S. C. 192 (R. 3).

The petitioner pleaded not guilty (R. 4), and moved to dismiss the indictment (R. 4-6). One of the contentions made in this motion was that the indictment was invalid because fewer than twelve members of the grand jury which returned it were impartial, for the reason that ten of its members were government employees and two were wives of government employees. In the alternative, a hearing was sought so that the bias in the grand jurors could be shown (R. 6). The motion was supported by affidavits of petitioner's counsel to the effect that, by virtue of the atmosphere created and exemplified by such matters as Executive Order 9835 (the President's Loyalty Order), and the enactment of the Internal Security Act of 1950, the climate of opinion in Washington was such that government employees would have hesitated to vote against the return of an indictment in this case (R. 15-17, 34-44). This affidavit was in turn supported by nine newspaper clippings, some with unsigned articles, and others reflecting the opinions of named columnists, some of which expressed the view that the loyalty program was having adverse effects on the morale of government employees (R. 45-63).

The petitioner's motion on this point was denied on the ground that there had been no showing of actual bias on the part of the jurors, or of circum-

stances which, either with or without the hearing sought by petitioner, would indicate that government employees would not be suitable grand jurors (R. 63-66).

Later, or the trial of the case, the following was stipulated or shown:

The petitioner was summoned by the Committee to appear as a witness at a hearing conducted on August 9, 10 and 11, 1949, in Washington, D. C. At the opening of the Committee's hearing on August 9, 1949, the Committee's counsel, Mr. Tavenner, made the following statement:[1]

> Mr. Tavenner. Mr. Chairman, the purpose of this hearing is to inquire into the question of Communist affiliation or association of certain members of Local 601 of the United Electrical, Radio and Machine Workers of America, CIO, which is engaged in work at industrial plants important to the national defense.
>
> The advisability of recommending legislation providing for security standards, and the advisability of tightening present security requirements in industrial plants working on certain Government contracts, was considered by the committee in both its open and execu-

[1] The exact language of the Committee counsel at the hearings does not appear in the record. It does appear in the published Committee hearings. Hearings, House Committee on Un-American Activities, 81st Cong., Hearings Regarding Communist Infiltration of Labor Unions, pp. 541-542. It was stipulated that the printed hearing transcript is accurate (R. 92).

tive sessions on June 6, 1949, as a result of the testimony of Leona and Joseph Franey and Loren G. Haas.

It will be remembered that Mr. Wood, the chairman of this committee, offered H. R. 3903, section 2 of which would make it an offense for any individual employed in connection with the performance of any national defense contract "(1) to become or remain a member of, or affiliated with, the Communist Party of the United States of America, or any organization which shall have been designated as subversive by the Attorney General; (2) to contribute funds or services to the Communist Party of the United States of America or to any organization which shall have been designated as subversive by the Attorney General; or (3) to advise, counsel, or urge any other individual employed in connection with the performance of any national defense contract to perform, or to omit to perform, any act if such act or ommission would constitute a violation of clause (1) or (2) of this section." This bill was referred to this committee.

It is the further purpose of this hearing to develop facts for the committee's consideration in connection with this resolution.[2]

* * * * *

---

[2] At petitioner's trial, the Committee's counsel was asked (R. 116-117):

Q. Do you care to make any further amplification of that statement of the purpose of? A. I may add that in connection with the investigation which the staff had

It is conceded that petitioner was aware of the purpose of the hearing (R. 19).

The basic authority of the Committee to conduct investigations and to subpoena witnesses in connection therewith depends on House Rule XI (q) (adopted for the 81st Congress in House Resolution No. 5), the crucial language of which authorizes the Committee on Un-American Activities to make, from time to time——

> * * * as a whole or by subcommittee * * * investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

---

made, it was discovered that there were no security standards applied by the Army to members of the National Organization of the UE. By that I mean persons who held national positions in the National Organization as distinguished from the local. It was discovered that the Atomic Energy Commission recognized the advisability and necessity of applying the security standards to those officers. That entire matter of construction, or difference of construction by the Army and by the Atomic Energy Commission was involved in the hearings, though testimony relating to that particular subject did not come out in this particular hearing other than to lay the foundation for it by showing who were members of the National Organization and what, if any, their communist affiliations may be.

Pursuant to the Committee's subpoena, petitioner appeared before a subcommittee of the Committee on August 11, 1949, and identified himself as a field organizer for the International Union of the United Electrical, Radio and Machine Workers of America (hereafter referred to as UE) and a member of Local 601 of that Union, which represented the employees of the Westinghouse Electric Corporation (R. 96-97). Thereafter, he was asked, and he answered, several other questions relating to the succession of posts he had held in the union and to his present position as chairman of the Western Pennsylvania Civil Rights Congress. He was then asked "Are you now or have you ever been a member of the Communist Party" (R. 97). The following colloquy thereupon ensued (R. 97-98):

> Mr. Quinn: I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the position taken by Brother Fitzpatrick yesterday.
>
> Mr. Wood. Did you hear his statement yesterday?

Mr. Quinn. Yes; I did.

Mr. Wood. Do you support it in its entirety?

Mr. Quinn. In its entirety.

Mr. Wood. Is there anything else you want to add to it?

Mr. Quinn. No; I don't.

Mr. Wood. Will you accept it as the expression of your views, then?

Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn. I hold that the Constitution holds sacred the rights of people——

Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

Mr. Quinn. I decline to discuss with the committee questions of that nature.

Mr. Wood. Proceed, Mr. Tavenner.

Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters * * *.

The record shows that on August 10, 1949, the day preceding Quinn's appearance, the subcommittee had questioned Thomas J. Fitzpatrick, chief steward of Local 601. Fitzpatrick, before being asked other than identification questions, was allowed to make an extended statement which was highly critical of the Committee, and alleged, in effect, that the Committee was attempting to smear the local union, that its investigation was "rigged by a Jesuit priest", and that its purpose was to influence union elections and wage negotiations with the Westinghouse Company (R. 103-106). His statement concludes (R. 106-107):

I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedom and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.

The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they

feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

Mr. Wood. What is it?

Mr. Fitzpatrick. The right of the people guaranteed by the Constitution.

Fitzpatrick, thereafter being questioned, was asked by Committee counsel whether he was or ever had been a member of the Communist Party. He responded as follows (R. 107-108):

Mr. Fitzpatrick. Mr. Chairman, in my opening remarks I gave quite a bit of my attitude on this question. I say that this committee has no right to pry into my mind.

Mr. Wood. We are not concerned with your opinion of the committee. We have asked you a simple question. Do you want to answer it or not?

Mr. Fitzpatrick. I am answering it, Mr. Chairman.

Mr. Wood. We don't have the time for a long dissertation.

Mr. Fitzpatrick. I think I have a right to answer it in my own way.

Mr. Wood. The question can be answered "Yes" or "No," or you can decline to answer it.

Mr. Fitzpatrick. Being just a common workingman, I will answer it in my own words. I don't think the committee has the right to dictate the choice of my words in answering it.

Mr. Wood. We are not attempting to do that. You may answer or decline to answer.

Mr. Fitzpatrick. I will answer the question. The Constitution guarantees the right to me and every other citizen to have beliefs, whether they are popular or unpopular, and to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Constitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here.

Mr. Wood. Now will you answer the question?

Mr. Fitzpatrick. I have answered the question.

Mr. Wood. It is not an answer at all.

Mr. Fitzpatrick. That is my answer.

Mr. Wood. Do you mean that is the only answer you are going to give?

Mr. Fitzpatrick. That is the way it has to be answered, according to my conscience.

Thereafter Fitzpatrick kept repeating that he was not refusing to answer the question but that he had answered it. On being asked similar questions he repeated that he had already answered them by

his statements already given (R. 108-114). For example (R. 108):

> Mr. Fitzpatrick. The answer to my previous question is the answer to this question. I have no intention of permitting this committee to abridge my constitutional rights on political opinions, associations, who I work with, who I meet with, what I read or think, or anything of that kind.

On another occasion he was asked whether he had requested one Copeland to apply for membership in the Communist Party, and his answer was as follows (R. 110):

> Mr. Fitzpatrick. Mr. Chairman, do I have to give you my answer again?
>
> Mr. Wood. I just want to know whether you did that one thing.
>
> Mr. Fitzpatrick. I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.
>
> Mr. Wood. And for the reason do you decline to answer the question?
>
> Mr. Fitzpatrick. I stand on the protection of the Constitution, the First and Fifth Amendments.
>
> Mr. Wood. And for those reasons decline to answer the question further?
>
> Mr. Fitzpatrick. I have answered the question.

Fitzpatrick said that he would answer any question regarding his actions, but would give no answer to any question seeking to elicit his political beliefs, activities, and associations, in the following colloquies:

> Mr. Fitzpatrick. Mr. Chairman, if you want to ask me questions about my actions of loyalty, question my loyalty, you have a right to do so, and I will answer them. So far as my political opinions, I have stated my position on that.
>
> * * * * *
>
> I will not talk about my association and actions with people who I know, what I did, or anything else. [R. 109.]
>
> * * * * *
>
> I have no intention of discussing my political actions or activities with this committee, for the reasons that I have stated before [R. 110].
>
> Mr. Fitzpatrick. I came here and I stated that if you have any questions about any actions that I have committed, I will answer. So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation. [R. 111.]
>
> * * * * *

At the close of the trial, the trial court found the petitioner guilty, and sentenced him to six months in jail and a fine of $500 (R. 158, 81). In

its opinion, the trial court concluded, *inter alia*, that (1) a question as to petitioner's membership in the Communist Party was pertinent to the matter under investigation, (2) that petitioner refused to answer that question, and (3) that petitioner, in so refusing, did not claim the privilege against self-incrimination since he could not do so by his reference to Fitzpatrick's statement (R. 133-138).[3]

The Court of Appeals, sitting *en banc*, reversed the judgment of the District Court and remanded the case for a new trial (R. 162-213). Its action was based principally on its rejection of the trial court's view that the privilege could not be claimed by adoption of Fitzpatrick's statement. The majority held that no specific formula is required to claim the privilege as a matter of law, and that, where a witness makes an equivocal statement, a question of fact, or at least a mixed question of law and fact, is presented which should be resolved in the first instance by the trial judge in the light of the factual setting of the particular case. In this case, the court held that the sufficiency of Quinn's claim rested on the sufficiency of Fitzpatrick's claim made the day before and which was not considered by the trial judge. The court refused to consider

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[3] The trial court stated (R. 138): "Since the privilege is personal, the defendant must assert it himself, since another may not know what is in a defendant's mind at the time he is called before Congress to testify on pertinent matters, to proper inquiry, and therefore, one may not, by reference, assert that privilege."

this question as an initial proposition and held that in a new trial the trial judge should determine (R. 168) "* * * whether Fitzpatrick's statement, in full text and context, related only to the claim of the rights of free speech and thought under the First Amendment, or whether an auditor could detect an intention to claim the privilege against self-incrimination, protected by the Fifth Amendment."

The court rejected the contention that, before a witness may be held in contempt for failing to answer a question, he must be specifically directed to answer, citing its decision in *Emspak* v. *United States*, 203 F. 2d 54, decided the same day, pending on certiorari, No. 9, O. T. 1954. It observed, however, that a factual question as to whether petitioner had the intent to refuse to answer the question, or whether he thought the committee had abandoned the question, remained unresolved, and should be determined by the trial judge on retrial (R. 171-172).

The majority rejected, as it had in the companion *Emspak* case (203 F. 2d at 56), the contention that petitioner should have been afforded a hearing on his motion to dismiss the indictment for the reason that ten members of the grand jury were Government employees and two were wives of Government employees (R. 172). Judges Bazelon and Edgerton thought that petitioner was entitled to a hearing on that issue (R. 172-186).

Judge Miller, in a dissenting opinion joined by

Judges Proctor and Clark (R. 199-212), was of the view that the trial court did not rest its holding only on the premise that the privilege against self-incrimination could not be asserted by reference, but also on a correct finding that Fitzpatrick's prior statement did not constitute a claim of the privilege. He thus saw no reason to remand the case for a new trial.

SUMMARY OF ARGUMENT

I

The petitioner contends that the Court of Appeals should have directed his acquittal on the ground that he had claimed the privilege against self-incrimination when he was asked by the Committee whether he was a present or past member of the Communist Party, rather than remanding the case for retrial on the issue of whether in fact petitioner claimed the privilege. The petitioner asserts that he adequately claimed the privilege by referring to or adopting the statement of Fitzpatrick, a prior witness before the Committee. We concede that a witness may assert the privilege by appropriate adoption of a claim of the privilege made by another witness. We contend, however, that Fitzpatrick did not claim the privilege and that, therefore, petitioner did not claim it by adopting Fitzpatrick's statement.

The privilege against self-incrimination is waived unless it is asserted before the tribunal which is questioning the witness. *United States* v. *Murdock*, 284 U. S. 141. Similarly, while the privi-

lege need not be claimed in the precise words of the Fifth Amendment, it must be asserted in such a manner as to inform the tribunal that the witness is claiming the privilege, so that uncertainty as to the witness' position will not deprive the tribunal of information which it is otherwise entitled to obtain. Fitzpatrick's statement consists of a bitter attack upon the Committee, followed by repeated assertions of political rights of speech, thought and association, coupled with an asserted right to privacy about such matters. Fitzpatrick never suggested that responsive answers might endanger him. In this immediate context, Fitzpatrick's oblique references to "the First Amendment to the Constitution, supplemented by the Fifth Amendment" and to the "First and Fifth Amendments" did not constitute an adequate claim of the privilege against self-incrimination.

Moreover, petitioner's statement in adopting Fitzpatrick's statement strongly suggests that petitioner regarded the latter's statement as an assertion of First Amendment rights, rather than a claim of the privilege. It should be noted also that both petitioner and Fitzpatrick had immediate and compelling motives, arising out of their union activities, to refrain from making clear and unequivocal claims of the privilege, and to bury deliberately in a mass of unrelated language their references to the Fifth Amendment. Under these circumstances, petitioner did not claim the privilege against self-incrimination before the Committee.

Although we believe that petitioner clearly failed to claim the privilege before the Committee, we accept the action of the court below in remanding the case for retrial on that issue. Whether the court below had power to determine this issue as an original matter (since it found that the trial court had not done so), it clearly had discretion not to do so.

II

Petitioner argues that the issue whether he properly claimed the privilege against self-incrimination by reference to Fitzpatrick's statement was already resolved against the Government under principles of *res judicata* and collateral estoppel, because the court which tried Fitzpatrick for contempt of the Committee, before petitioner was tried, held that Fitzpatrick had properly claimed the privilege.

The argument is not sound. First, it should be noted that the Government was foreclosed from taking an appeal to correct the Fitzpatrick judgment and, therefore, should not be precluded from presenting the question to the courts in another case. Second, it is clear that principles of *res judicata* and collateral estoppel apply only to criminal proceedings involving the same parties. Finally, there was, in any event, no such identity of issues in the two cases, Fitzpatrick's and petitioner's, as would justify application of *res judicata* and collateral estoppel principles. For Fitzpatrick's claim in Fitzpatrick's case might well be judged in the light of what Fitzpatrick might have

intended, subjectively. This would not be so with respect to petitioner who could rely only on the objective meaning of Fitzpatrick's words. Moreover, it is far from clear whether petitioner adopted as his own some or all of Fitzpatrick's statements before the Committee. Under these circumstances, the courts below properly treated the issue of whether petitioner had claimed the privilege as one to be determined independently in this case.

III

Petitioner urges that he should have been acquitted because he was not specifically directed to answer the question involved in this case after he had objected to the question. We have set forth in our brief in *Emspak* v. *United States*, No. 9, this Term, our view that a witness before a Congressional committee who objects to a question must be informed that the Committee has rejected his objection and is requiring him to answer, although not in any rigid form of words, before he can be punished for refusal to answer. The record in this case makes it clear that petitioner must have understood that his objection to answering had been rejected by the Committee and that it was requiring him to answer the question. In any event, in the circumstances of this case, it was not error for the Court of Appeals to direct a retrial on this point as well.

IV

Petitioner contends that the presence of 10 government employees and two wives of government

employees among the 20 grand jurors who voted on his indictment required the trial court to grant his motion to dismiss the indictment or, alternatively, a hearing to allow petitioner an opportunity to show that government employees would be unable to act as impartial grand jurors in the case of one cited for contempt by the House Committee on Un-American Activities. We contend that the motion was properly denied.

A. Generally, the courts have held that, in the absence of a controlling statute, bias on the part of a grand juror does not invalidate an indictment. In the few cases where bias of grand jurors has been held to invalidate an indictment, the showing of bias was clear, strong, and personal. General allegations of prejudice in grand jurors will not suffice. These principles reflect not only the historical function of the grand jury to report the knowledge of the community to the courts, but also the practical truth that the functions of the grand jury would be greatly impaired if indictments can be impeached upon allegations of vague or general community prejudices against particular groups.

This Court has considered the composition of grand juries only in cases involving the exclusion of particular groups, such as Negroes, from grand jury service. See, *e.g.*, *Cassell* v. *Texas*, 339 U. S. 282. Decisions of this Court setting aside indictments returned by grand juries from which such groups have been systematically excluded emphasize that the principal protection of an accused lies in the selection of the grand jury from a repre-

sentative panel, rather than in the absence of vague and general prejudices in the other members of the panel.

B. Applying these principles, petitioner's motion to dismiss the indictment, or for a hearing to explore the possibility of bias in government employees serving on the grand jury, was properly denied. The allegations made in the supporting affidavits as to the effect of the loyalty program and related matters, in creating "a miasma of fear among government employees in the District of Columbia," failed to demonstrate that any government employees serving as grand jurors feared, or had any reason to fear, that an honest vote against the return of an indictment in this case would be regarded as evidence of disloyalty or would in any other way prejudice them. The inadequacy of this showing is emphasized by the fact that under Rule 6(b) of the Federal Rules of Criminal Procedure petitioner must show that substantially all government employees serving as grand jurors in a case such as this are, or must be presumed to be, afraid to act in accordance with their oaths as grand jurors. Indeed, the showing made here is simply a detailing of that which was rejected as insufficient in *Dennis* v. *United States,* 339 U. S. 162, even as applied to petit jurors, and is insufficient, *a fortiori,* as applied to the composition of a grand jury.

In requesting a hearing to determine whether there existed such bias on the part of government employees serving on the grand jury, petitioner contended that he was entitled to "inquire into the effect of the President's Loyalty Order upon gov-

ernment employees in general and those in the Grand Jury in particular", and "to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of * * * [government employees'] activities as Grand Jurors or the activities of spouses of Grand Jurors in respect to issues like those involved in the present indictments." Petitioner's request for a hearing on such far-ranging questions is not supported by the showing required by *Dennis* v. *United States, supra.* Moreover, the lack of justification for such a hearing is emphasized by the rigid provisions of Rule 6 of the Federal Rules of Civil Procedure which, by prohibiting disclosure of grand jurors' votes, are designed to protect grand jurors from the precise pressures conjectured by petitioner. Courts do not undertake the unusual procedure of probing the motives of grand jurors upon the basis of a naked assumption that grand jurors and executive officers have joined in violating this legal requirement of secrecy.

C. The significance of possible bias in grand jurors must be measured not only in the light of the fact that the grand jury determines only whether there is probable cause to believe that the accused has committed a crime, rather than the ultimate question of guilt or innocence, but in the light of the issues before the grand jury. The transcript of the Committee's hearing clearly constituted a *prima facie* basis for concluding that petitioner had refused to answer a pertinent question addressed to him by the Committee, and the grand jury could hardly be expected to weigh in its ex parte proceed-

ings the more subtle matters of defense which divided the court below. Under these circumstances, and considering that the bias alleged in the government employees on the grand jury is general, rather than specific and personal, the petitioner cannot show such prejudice as would warrant dismissal of the indictment or require a hearing.

V

We have set forth in the government's brief in *Emspak* v. *United States,* No. 67 last Term, No. 9 this Term, our arguments that the House of Representatives' Resolution creating the Committee on Un-American Activities is valid both on its face and as applied in that case. As applied in this case, we contend that the House of Representatives empowered the Committee to investigate "the extent, character, and objects" of Communist propaganda activities in the United States, that the Committee was thus authorized to conduct an investigation into the presence of Communists in labor unions and, as a part of such investigation, to ask petitioner, a member and organizer of the United Electrical, Radio and Machine Workers of America, whether he was a present or past member of the Communist Party. We further contend that as thus applied the Resolution does not violate the First Amendment.

Each House of Congress may empower its committees to obtain information by compulsion to assist Congress in performing its legislative functions. *McGrain* v. *Dougherty,* 273 U. S. 135;

Sinclair v. *United States*, 279 U. S. 263. Since Congress can legislate with respect to the Communist Party and its activities, *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Adler* v. *Board of Education*, 342 U. S. 485; *American Communications Association* v. *Douds*, 339 U. S. 382; *Dennis* v. *United States*, 341 U. S. 494, either House may authorize its committees to investigate and obtain information concerning the administration and efficacy of existing legislation relating to Communist activities, as well as the need for new legislation.

The origin and history of the Committee and its predecessors reveal that the House of Representatives, in creating the Committee, specifically intended it to investigate the "extent, character, and objects" of Communist propaganda activities and the "diffusion" of Communist propaganda in the United States. Moreover, Congress has ratified this construction of the resolution (as it is applied here), and at the same time has demonstrated that the Committee's investigations serve a direct legislative purpose, by enacting significant statutes dealing with Communism and based in large part upon the Committee's reports and recommendations.

The Committee clearly was empowered to investigate Communist propaganda activities in labor unions. *American Communications Association* v. *Douds, supra.* As a minimum, it was entitled to inquire to what extent the leadership of petitioner's union was comprised of Communists, what propaganda was employed to recruit them into

the Party, whether they were using their positions of union leadership to recruit others into the Communist Party or otherwise to accept the Party's propaganda objectives, and the ultimate objectives of such propaganda and recruiting activities. Accordingly, the Committee was empowered to require petitioner, a member and organizer of UE, to state (absent a claim of the privilege against self-incrimination) whether he was a present or past member of the Communist Party.

ARGUMENT

I

Petitioner Did Not Claim the Privilege Against Self-incrimination

The petitioner contends that the Court of Appeals should have directed an acquittal on the ground that he properly claimed the privilege against self-incrimination, rather than remanding the case for a retrial on this issue. We contend that petitioner failed to assert the privilege, but we do not challenge the action of the court below in remanding the case for a new trial on the question of whether petitioner adequately claimed the privilege.

A. *Petitioner did not claim the privilege against self-incrimination by adopting Fitzpatrick's statement because Fitzpatrick did not claim the privilege.*

The sole basis for petitioner's contention that he properly claimed the protection of the Fifth

Amendment's privilege against self-incrimination is that he adopted the statement of Fitzpatrick, a prior witness before the same Committee (Pet. Br., pp. 27-44). We concede that the petitioner was entitled to assert the privilege in response to the question as to whether he was a present or past member of the Communist Party. We also concede that petitioner adopted some or all of Fitzpatrick's statement, and that, as the court below held (R. 165-166), one may claim the privilege by appropriate adoption of another's assertion of it. We contend, however, that Fitzpatrick's statement did not constitute or include an assertion of the privilege against self-incrimination, and, accordingly, that petitioner did not claim the privilege by adopting Fitzpatrick's statement.

The privilege against self-incrimination is waived by the failure to assert it. *United States* v. *Murdock,* 284 U. S. 141; *Vajtauer* v. *Commissioner,* 273 U. S. 103, 113; 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2268. As an exception to the fundamental obligation to testify, "so necessary to the effective functioning of courts and legislatures" (*United States* v. *Bryan,* 339 U. S. 323, 331), it must be asserted in clear and unequivocal fashion so that uncertainty and confusion as to the witness's position will not unnecessarily restrict the range of information which the questioning tribunal is entitled to obtain. See the Brief for the United States, pp. 37-39, *Emspak* v. *United States,* No. 9, this Term.

Also, it is clear that a witness who desires the

protection of the privilege against self-incrimination must inform the questioning tribunal that he is claiming the privilege with sufficient precision to distinguish his claim of privilege from any other grounds for refusal to answer which he is asserting or which might be available to him.

Viewed in the light of these principles, it is plain that Fitzpatrick's statement, adopted by petitioner, did not invoke the privilege against self-incrimination. To begin with, this factual question is not, as petitioner states it (Pet. Br. 34-36), whether "The use of the words 'Fifth Amendment' is sufficient to invoke the protection of the privilege." We will assume that the privilege would be invoked if Fitzpatrick had stated that "I refuse to testify on the ground of the Fifth Amendment." Rather, the question is whether Fitzpatrick's coupling of the First *and* Fifth Amendments, in support of his statements of the political rights of minorities and his assertion of a general right of privacy in challenge of the Committee's powers, was sufficient to apprise the Committee that petitioner was claiming the protection of the privilege.

Only a reading of Fitzpatrick's statement (R. 106-114; Statement, *supra,* pp. 12-16) will reveal how thoroughly buried was the claim of privilege which is now put forward. After a bitter introductory attack upon the motives of the Committee (R. 103-106), Fitzpatrick referred to the rights of individuals to hold opinions and beliefs that may be unpopular, and added (R. 107) that:

> In my opinion, [the Constitution] gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

We submit that in this context this reference to the Fifth Amendment failed to inform the Committee that Fitzpatrick was claiming the protection of the privilege against self-incrimination.

Moreover, in the extensive and related discussion which followed, Fitzpatrick made not the slightest reference to self-incrimination. This omission alone, or in another context, would not be decisive, since a witness is not required to recite verbatim the self-incrimination clause of the Fifth Amendment. But Fitzpatrick not only failed to express any apprehension of danger but repeatedly characterized his position in terms of a lack of power in the Committee to inquire into his political beliefs, activities, and associations (R. 107, 108, 109). It was after Fitzpatrick had thus described his own stand again and again that there occurred his only other reference to the Fifth Amendment, as follows (R. 109-110):

> Mr. Tavenner: Was it the Communist Political Association, then, that you tried to get [Clarence D. Copeland] to join?
>
> Mr. Fitzpatrick: I have given you my answer.
>
> Mr. Tavenner: In other words, you will not

answer whether you did or did not solicit his membership?

Mr. Fitzpatrick: I will not talk about my association and actions with people who I know, what I did, or anything else. I don't think it reflects on my loyalty or disloyalty or anything else.

Mr. Wood: Mr. Fitzpatrick, did you ever at any time during the year 1943 furnish an application blank and request Clarence D. Copeland to sign and make application for membership in the Communist Political Association, or the Communist Party?

Mr. Fitzpatrick: Mr. Chairman, do I have to give you my answer again?

Mr. Wood: I just want to know whether you did that one thing.

Mr. Fitzpatrick: I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.

Mr. Wood: And for that reason do you decline to answer the question?

Mr. Fitzpatrick: I stand on the protection of the Constitution, the First and Fifth Amendments.

In this context, this second reference by Fitzpatrick to the Fifth Amendment did not inform the Committee that he feared his answer would tend to incriminate him. Indeed, it is quite possible that Fitzpatrick did not even intend to claim the privilege.

When petitioner adopted Fitzpatrick's position as his own (R. 97-98), he simultaneously characterized the objection as a right to privacy with respect to political matters. Thus, petitioner stated (R. 97) that:

> I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.

This statement strongly suggests that petitioner did not regard the Fitzpatrick statement as constituting or including a claim of the privilege against self-incrimination, but as an assertion of rights under the First Amendment.

Under these circumstances, we contend that petitioner did not adequately inform the Committee that he was claiming the protection of the privilege.

Moreover, we feel bound to point out the probability that petitioner's ambiguous references to the Fifth Amendment (and those of the petitioner Emspak in No. 9), which he now contends constituted a claim of privilege, were phrased deliberately in such vague terms so as to enable petitioner (and Emspak) to obtain the benefit of the privilege without incurring the popular opprobrium which often attaches to its exercise. This suggestion is not based merely upon the obvious fact that it would have been extremely easy for petitioner to have informed the Committee that answers to its

questions might incriminate or endanger him. It is also based upon facts of record, and matters appropriate for judicial notice, which reveal that petitioner (and Fitzpatrick and Emspak) had compelling and immediate reasons to refrain from making any public statements from which it might be inferred, properly or not, that they were Communists or Communist sympathizers.

These facts are as follows: When petitioner (and Fitzpatrick) appeared before the House Committee in August 1949, there had already commenced the great debate within and without UE as to whether its leadership was Communist dominated, a debate which led to its expulsion on November 2, 1949, from the Congress of Industrial Organizations as a Communist dominated union.[4] Also, both petitioner and Fitzpatrick were candidates in an election about to be held in the Westinghouse East Pittsburgh Local 601 of UE (R. 103-104). This election was generally regarded as a struggle between Communist and anti-Communist factions in Local 601 (Pet. Exh. 2, 3, 4; R. 23-25).

In all likelihood, an unequivocal assertion of the privilege against self-incrimination by petitioner (and by Fitzpatrick and Emspak, the General Secretary of UE), in response to questions relating to Communist Party membership and activity, would have been regarded popularly as an admission of such matters. So regarded, it probably would have

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[4] 69 Monthly Labor Review (1949), pp. 640-644; New York Times, November 2 and 3, 1949.

been extremely damaging in the struggle then going on in Local 601 and throughout UE.

We concede, of course, that in a judicial proceeding no such adverse inference may or should be drawn from assertion of the privilege. However, it is a matter of common knowledge that drawing such an adverse inference is a widespread popular reaction to assertion of the privilege. We submit that petitioner (and Fitzpatrick and Emspak) must have anticipated that such would have been the general reaction of the rank-and-file membership of UE to any unequivocal claims of the privilege.

Under these circumstances, petitioner (and Fitzpatrick and Emspak) had compelling motives for burying any claim of the privilege in a form and mass of words which could not be seized upon by their union opponents. Clearly, they cannot now complain that neither the Committee nor the courts below failed to recognize their oblique references to the Fifth Amendment as an assertion of the privilege against self-incrimination.

B. *In any event, it was not error for the Court of Appeals to remand the case for a retrial on the question whether petitioner claimed the privilege.*

Although we think it is clear that the petitioner did not claim the privilege against self-incrimination, and although we also think it clear that the Court of Appeals had the power to so hold, and

probably should have done so, we think it is equally clear that it was not error for that court to remand the case for a new trial on the issue. 28 U.S.C. 2106; *Bryan* v. *United States,* 338 U.S. 552.

It is open on a new trial to determine whether petitioner's statement should be taken as a reference to all of Fitzpatrick's statements, as we have assumed in indicating the insufficiency even of the whole, or only to Fitzpatrick's original opening statement; or whether petitioner made reference only to Fitzpatrick's general criticism of the methods and motives of the Committee. As we have indicated, a canvass of these questions would not help petitioner. But we would not say that a Court of Appeals committed error in assigning to the District Court the task of making initial findings in that area.

II

The Question of Whether Petitioner Claimed the Privilege Against Self-incrimination Is Not Controlled by Principles of Res Judicata or Collateral Estoppel

It is admitted that whether the petitioner asserted the privilege against self-incrimination depends upon whether it was claimed in the statement of Fitzpatrick, which was adopted by petitioner. Since the court which tried Fitzpatrick for contempt held that he had claimed the privilege (*United States* v. *Fitzpatrick,* 96 F. Supp. 491 (D. D.C.)), petitioner urges that the question of whether petitioner claimed the privilege is now foreclosed against the Government and cannot be

litigated in this case. Accordingly, he urges that he should have been acquitted. This contention is likewise without merit.

It is clear that the principles of *res judicata* and collateral estoppel apply only in litigation between the parties in a criminal proceeding. See *United States* v. *Oppenheimer*, 242 U.S. 85, 87; *Frank* v. *Mangum*, 237 U.S. 309, 344; *Coffey* v. *United States*, 116 U.S. 436, 443.[5] None of the authorities cited by petitioner even suggests that a person who is not a party to a criminal proceeding which results in an acquittal can later urge *res judicata* or collateral estoppel against the United States, which could not appeal from the judgment of acquittal.

Since petitioner obviously would not have been foreclosed on this issue if Fitzpatrick had been convicted, petitioner seeks to avoid the rule of mutuality by asserting that the Government's obligation to establish in both cases the same fact, *i.e.*, that Fitzpatrick had not claimed the privilege, dispenses with the mutuality requirement. But even this Court's decision in *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127-128, upon which petitioner relies heavily (Pet. Br. 46-47), recognizes that the exception to the rule of mutuality has been applied in "cases where the relation between the defendants in the two suits

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[5] None of these cases directly states this. But they all use language which *assumes* that *res judicata* principles are applicable only in favor of or against those who were parties to the earlier proceedings.

has been that of principal and agent, master and servant, or indemnitor and indemnitee". To the same effect is Section 451 of Freeman on *Judgments* (5th ed.), also relied upon by petitioner (Pet. Br. 46), while Section 99 of the Restatement of *Judgments* on its face is not concerned with the effect of judgments in criminal proceedings. See also the Scope Note preceding Chapter I of the *Restatement of Judgments.*

Moreover, petitioner's argument ignores the crucial fact that a determination with respect to Fitzpatrick's claim in Fitzpatrick's case is not necessarily the same as a determination with respect to Fitzpatrick's claim as adopted by petitioner. All of the circumstances of the Fitzpatrick hearing were relevant in determining whether Fitzpatrick had claimed the privilege—in a case where Fitzpatrick was on trial. And if there were some circumstance known to Fitzpatrick or to the Committee which threw light on Fitzpatrick's words or added to the Committee's understanding of them, they would be admissible in Fitzpatrick's case.

On the other hand, there would be a serious question whether anything about Fitzpatrick's hearing was relevant in petitioner's case except an objective reading of the record. Fitzpatrick's testimony as to what he meant to say would be relevant in his own defense. It is doubtful, however, that such testimony would be relevant in petitioner's defense.

There is, in addition, some doubt as to just what portions of Fitzpatrick's testimony petitioner was

referring to. When he was asked whether he was or had been a member of the Communist Party, he replied (R. 97):

> I would like to make a statement *along the lines* that Mr. Fitzpatrick made yesterday * * *. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the *position* taken by Brother Fitzpatrick yesterday.
>
> Mr. Wood. Did you hear his *statement* yesterday?
>
> Mr. Quinn. Yes, I did.
>
> Mr. Wood. Do you support it in its entirety?
>
> Mr. Quinn. In its entirety.
>
> Mr. Wood. Is there anything else you want to add to it?
>
> Mr. Quinn. No; I don't.
>
> Mr. Wood. Will you accept it as the expression of your views, then?
>
> Mr. Quinn. You may. * * *
>
> [Emphasis added.]

It is not clear from this dialogue, which was substantially all the colloquy on the point, whether

petitioner adopted only Fitzpatrick's formal, introductory statement, or whether he adopted all of Fitzpatrick's following comments and responses. Even assuming, for purposes of argument, that petitioner adopted every statement of Fitzpatrick which was at all pertinent to the latter's refusal to testify, different results in the cases might well be warranted by petitioner's independent characterization of his own position, that "I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire."

There is, in short, no such simple identity of issue between Fitzpatrick's contempt liability and that of petitioner as would justify the application of *res judicata* or estoppel principles in the present case, even assuming that the normal principles of mutuality are inapplicable.

III

Petitioner's Refusal to Answer Whether He Was or Had Ever Been a Member of the Communist Party Was With Knowledge That the Committee Was Requiring Him to Answer

Petitioner urges that he should have been acquitted because he "was never specifically directed by the committee to answer the question" (Pet. Br. 48-49), and adopts the arguments to that effect in the brief of the petitioner in *Emspak* v. *United States,* No. 9. In the Government's brief in *Emspak,* pp. 39-43, we have set forth our view, which is that of the court below, that a witness before a Congressional committee who raises an objection to a question must in some manner be clearly ad-

vised that his objection has been rejected and that he is being required to answer, before his refusal can constitute a violation of 2 U.S.C. 192. We also contend that no rigid form of words need be used to apprise the witness of this fact. Accordingly, we request the Court to consider that portion of our brief in *Emspak* as if it were set out here.

A. *Petitioner understood that the Committee had rejected his objections to its question, and was requiring him to answer.*

After petitioner indicated his adoption of the views expressed by Fitzpatrick, he was asked by the Committee chairman whether for that reason he declined to answer. Petitioner replied that he was not declining to answer and referred again to his support of Fitzpatrick's views. The Chairman then said (R. 98):

> Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have even been a member of the Communist Party?
>
> Mr. Quinn. I hold that the Constitution holds sacred the rights of people——
>
> Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you now are or ever have been a member of the Communist Party, or do you decline to answer?

Mr. Quinn. I decline to discuss with the committee questions of that nature.

Mr. Wood. Proceed, Mr. Tavenner.

Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters * * *.

The colloquy shows, first, that the Committee clearly indicated to the petitioner that it did not regard his reference to Fitzpatrick's statement as a sufficient justification for refusal to answer. The words used here, "having made that statement * * *, will you now answer the question * * *?" clearly conveyed to the witness that the Committee was overruling his objection and directing him to answer notwithstanding his objection.

Moreover, the colloquy shows that the petitioner clearly understood that the Committee had rejected his views and was nonetheless remaining adamant in his refusal to answer. For the Chairman posed the alternative to him—"You have stated your position. * * * will you now answer the question * * * *or do you decline to answer*" [emphasis added]. Petitioner replied: "I decline to discuss with the committee questions of that nature. (R. 98)."

Unless the law is to be that a specific direction to answer in *haec verba* is required, and even petitioner does not seriously press this view, we think it is clear that the record establishes that the petitioner's refusal to answer was with knowledge that the Committee was requiring him to do so.

B. *In any event, it was not error for the Court of Appeals to direct a retrial on the question of whether petitioner understood that he was required to answer.*

The Court of Appeals did not decide whether the present record showed that petitioner was aware that he was being required to answer in spite of his objections. It reversed for a new trial on the question whether petitioner had claimed the privilege against self-incrimination and observed, in doing so, that the issue of whether petitioner's refusal to answer was deliberate and intentional would be open on retrial (R. 172). In view of the remand of the case on the claim of privilege issue, the remand on the "refusal" issue as well was within the power of the court below.

IV

Petitioner Was Not Entitled to a Dismissal of the Indictment Because of the Presence of Government Employees on the Grand Jury, nor Did His Proffer Entitle Him to a Hearing on that Issue

The petitioner claims that his conviction should be reversed because his motion, challenging the indictment because of the presence of government employees on the grand jury, was improperly denied. The motion sought either (a) the immediate dismissal of the indictment, on the assumption that the allegations of the motion sufficiently showed the bias of government employees serving on the grand jury, or (b) a hearing to give the petitioner an opportunity to demonstrate this bias. The basic

contention, on either aspect of the motion, is that government employees could not act as fair and impartial grand jurors because of alleged pressures put on government employees, particularly by the President's Loyalty Program, to express antagonism to Communism and Communists.

We submit that this contention is unsound. As we shall show below, the principle followed by most of the courts that have dealt with the problem is that bias in a grand juror, in the absence of a controlling statute, does not invalidate an indictment except where the showing of bias in particular grand jurors is specific, individual, and strong. And, by this test, it is plain that the allegations in the present case did not suffice to require a dismissal of the indictment or a hearing on the issue of bias.

A. *The Standards of Bias.*

Most of the courts that have had occasion to deal with the problem have held that, absent a statute, bias on the part of a grand jury does not invalidate its indictment. See e.g. *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D. N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 301 (N. D. Calif.), and cases collected in support of this proposition in Annotation, *Prejudice of Member of Grand Jury Against Defendant as Ground of Attack on Indictment*, 88 A.L.R. 899, and 24 Am. Juris., Grand Jury, § 10. Many courts have sustained this view even on records which have made the implication of bias fairly strong. See e.g.

United States v. *Williams*, Fed. Cas. No. 16,716 (C.C.D. Minn.) (prosecutor who tried case had been a member of the grand jury); *Coblentz* v. *Maryland*, 164 Md. 558, 166 Atl. 45 (indictment against defaulting bank official returned by grand jury some of whose members had lost money as a result of default); *State* v. *Easter*, 30 Ohio St. 542 (murder indictment returned by grand jury which included nephew of deceased); *Rice* v. *State*, 204 Ark. 236, 161 S.W. 2d 401 (indictment returned by grand jury which included unsuccessful political opponent of accused); see also *United States* v. *Caldwell*, 8 Alaska 117, 121-122, and *Collins* v. *State*, 3 Ala. App. 64, 67, 58 So. 80.

New York, which has a statutory provision that permits challenge of a grand juror if it appears "That a state of mind exists on his part in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging" (New York Code of Criminal Procedure, § 239(6); see also § 376(2)), has interpreted the statute to mean that there must be a showing of actual bias of an individual juror, as contrasted with implied bias, in order to disqualify. *People* v. *Prior*, 268 App. Div. 717, 54 N.Y.S. 2d 150, 153, affirmed, 294 N.Y. 405, 410-411, 63 N.E. 2d 8, 10. And California has, by statute, expressly withdrawn an earlier statutory right to challenge a grand juror or to attack an indictment on the

ground that grand jurors were prejudiced. *People* v. *Kempley,* 205 Cal. 441, 446-448, 271 Pac. 478, 480-481.

There are, however, cases in which the bias was particularly clear, and which have, in consequence, invalidated the indictments. See, e.g., *State ex rel. Reichert* v. *Youngblood,* 73 N.E. 2d 174 (Ind.), (grand juror reported to have boasted "I know how I got on the grand jury. We are going to get a Mayor * * *.")[6] The picture, in short, is that bias of grand jurors is not a ground for invalidating an indictment, except in cases as clear as *Youngblood, supra.* This picture clearly reflects the view, often expressed, that an "indictment is, after all, no more than an accusation." See, e.g., *Remington* v. *United States,* 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.

In addition, it should be pointed out that even when it is recognized that some kinds of bias may disqualify a grand jury, it is still required that the showing be made of that bias in specific terms,

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[6] The *Youngblood* court, at 73 N.E. 2d 179, cited with approval the following quotation:

"The general rule is that neither the bias nor prejudice of a grand juror, nor his interest in a prosecution (other than a direct pecuniary interest), nor the fact that he has formed, or expressed an opinion, will so disqualify him as to render invalid indictments returned by the grand jury. 20 Cyc. 1300; United States v. Belvin, C.C., 46 F. 381; Commonwealth v. Woodward, 157 Mass. 516, 32 N.E. 939, 34 Am. St. 302; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758. But we know of no authority which goes so far as to hold that this would be true where jurors had determined, through malice or bribery, to violate their oaths. It is the difference between honest error, to which all men are subject, and the wilful corruption which distinguishes the malefactor."

rather than in the form of a mere general allegation of prejudice. See e.g., *Cleveland* v. *United States*, 146 F. 2d 730, 732-733 (C.A. 10), affirmed, 329 U.S. 14, where it was alleged that the indictment against the defendant for statutory rape resulted from a fractional dispute in the Mormon Church, and "that the foreman of the grand jury was a prominent and dominating figure in the high priesthood quorums of the church; that, upon information and belief, a large majority of the grand jurors, if not all of them, were likewise influential members of the church; and that the indictment was returned in a spirit of animosity and enmity toward the defendant." The court rejected this showing as insufficient, stating (146 F. 2d at 732-733):

> * * * Except the ex parte affidavit attached to the motion, which contained many allegations predicated upon information and belief, there was no showing that the foreman or any other member of the grand jury belonged to any particular religious sect, or that he bore any animosity, enmity, or prejudice against the defendant. Neither was there any showing that due to prejudice or other like attitude toward the defendant, the foreman or any other member exerted or sought to exert influence with members of the body in bringing about the return of the indictment. Assuming, without so deciding, that the indictments were subject to attack on the ground indicated, the motions and ex parte affidavits,

alone and without more, were not enough to warrant the quashing of them.

It would seem, therefore, that there is considerable support for the view (a) that only circumstances indicating strong actual and personal bias normally will be recognized as invalidating an indictment, and (b) that those circumstances must themselves be specifically set out in any attempt to challenge the indictment.

This result is consistent with the history and purpose of the use of grand juries. Historically, dating at least from the time of our Constitution, it is clear that grand juries were not expected to be unprejudiced. They were in part serving as conduits to report the common knowledge of the community to the courts. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144-145. The fact that they might have formed a prejudgment as to the truth of an accusation was not relevant. *United States* v. *White,* Fed. Cas. No. 16,679 (C.C. D.C.). Nor was the fact that they might even have prejudices against a possible accused unrelated to the circumstances of the particular case. Cf. Fee, D.J., in *United States* v. *Smyth,* 104 F. Supp. 283, 301 (N.D. Col.), and A. N. Hand, D.J., in *United States* v. *Rintelen,* 235 Fed. 787, 789 (S.D. N.Y.). See also *United States* v. *Fujimoto,* 102 F. Supp. 890, 896 (D. Hawaii). They took oaths not to allow prejudices to influence their returns, and this was apparently regarded as a sufficient safeguard.

Although the growth in size of the communities in which grand juries act means that they are far less likely to have prior personal information about the accusations which they return, this same growth also means that grand jurors are more likely to have biases with respect to particular classes of persons or particular types of crimes, which are not tempered by personal knowledge of the accused. A grand jury in a modern urban community will, in the course of its service, have brought before it a large gamut of crimes and persons. It would be a serious impairment of the work of such juries if defendants were free to invalidate indictments on showing, in general terms, that there were community prejudices of one sort or another probably operating on the grand jury to their disadvantage, or to be free to delay the process of a criminal case by demanding a hearing in order to rummage among the thoughts of individual grand jurors to discover such possible prejudices. A "trial of the grand jury", particularly on the basis of unsubstantiated allegations, would be a serious obstacle to the process of disposing expediously of criminal charges—on their merits. See Swan, C.J., in *Remington* v. *United States*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907. And it would be a serious addition to the disadvantages incident to citizen service on grand juries. It follows, therefore, that the practical operation of the grand jury system requires, what we have suggested that the cases hold, that a show-

ing of grand jury bias must be clear and strong; and that, absent such a showing, a foraging operation to discover such bias cannot be permitted.[7]

There is only one group of cases in which this Court has considered squarely the composition of grand juries. In these cases, the Court has insisted that grand jury panels be broadly representative of the community, and has struck down indictments returned by grand juries drawn from panels from which particular groups—Mexicans, Negroes, women, and wage earners—had been deliberately excluded. E.g. *Hernandez* v. *Texas*, 347 U.S. 475; *Ballard* v. *United States*, 329 U.S. 187; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. In doing so, the Court has indicated that an accused is entitled to indictment by "a fair and impartial grand jury" (*Cassell* v. *Texas*, 339 U.S. 282), which suggests that a grand jury made up by a systematically discriminatory process is regarded by this Court as not able to be fair and impartial in considering matters which involve the

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[7] This Court has never said what kinds of bias, if any, would disqualify a grand jury. In *Hale* v. *Henkel*, 201 U.S. 43, 59, the Court said that it is the function of a grand jury "to stand between the prosecutor and the accused." See also *Ex parte Bain*, 121 U.S. 1, 10-11. This means, of course, that a grand jury which was merely the tool of the prosecution would not be a proper grand jury; but it sheds very little light on any criteria by which to judge whether a particular jury is, in fact, a tool of the prosecutoin. It would seem, however, that not every circumstance which might indicate bias in the jury would indicate that the jury was so pliant that it would do whatever it was told.

excluded group.[8] The petitioner urges this point as a basis for his argument that the possibilities of bias in government employees serving on a grand jury, dealing with a person cited for contempt of the House Committee on Un-American Activities, are quite as great as the possibilities of bias in a grand jury, discriminatorily selected, against members of the group which is excluded.

But, even assuming that the arbitrary exclusion holdings ultimately reflect the view that the excluded group may be subjected to the improper biases of grand jurors drawn solely from the excluding group, it is clear that this is not the only

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[8] Cf. *Strauder* v. *West Virginia*, 100 U. S. 303, 309, which dealt with petit jury panels from which Negroes had been deliberately excluded:

"* * * * It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State should deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

basis for those decisions; and, indeed, those holdings implicitly refute the view that a *possibility* of grand jury bias is enough to disqualify the jury. Those cases turn principally on the view that the grand juries chosen are unrepresentative of the community, and therefore not proper grand juries, a view which clearly reflects the history of grand jury proceedings to which we referred above. It is plain that it is not merely general prejudice against the accused's class that is involved, because the remedy of the Court has been to require the selection of grand jury panels without the arbitrary exclusion. Such a remedy does not provide for the exclusion of those who might still be prejudiced; it merely insures the presence, at random, of the previously excluded group on jury panels, although not necessarily on particular grand juries. Any serious prejudice against members of the previously excluded group is not likely to be erased or rendered ineffective by the inclusion of members of that group on a jury panel; and, presumably, even the inclusion of a member on a particular grand jury would not prevent other grand jurors from voting in accordance with their prejudices. It seems, therefore, that mere general prejudice is not being cured, but rather unfair representation. The Court has implicitly recognized in those cases that the various general community prejudices are not a basis for attack on the grand jury, so long as there is a fair chance that grand juries will be representative of the entire community. Cf. *Ruthenberg* v. *United States*, 245 U. S. 480 (fact that no Social-

ists on grand jury held not a basis for challenging indictment).

B. *By the Standards Properly Applicable in the Disqualification of Grand Jurors for Bias, the Petitioner's Allegations Are Insufficient.*

1. *The allegations on the present record.*

By the standards we have set out above, there is no basis for attack on the present indictment. The petitioner, in his motion to dismiss, set out a collection of circumstances which show, he says, why members of the grand jury indicting him could reasonably feel that it would be dangerous for them to vote against indictment. These allegations do not show, do not even purport to show, that any particular juror felt this way, but, at best, urge only that some basis existed for supposing that some government employees, if called as grand jurors, might have felt afraid. To emphasize this, we set the allegations out particularly, as follows:

> 1. All government employees, at the time of petitioner's indictment, were subject to Executive Order 9835, which included as one of its criteria for continued government employment the absence of any "sympathetic association" with the Communist Party or other activities alleged to be "subversive". (R. 16.)
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> 2. The indictment in this case arose out of an investigation of the House Committee on

Un-American Activities (R. 16), a Committee which "has given much time and consideration to the investigation of alleged Communist influence among federal government employees and has announced * * * that the Committee files have been used by the investigative agencies of the federal government to determine the loyalty of federal government employees" (R. 36).

3. The House Committee on Un-American Activities made threats against the Attorney General of the United States if indictments were not returned against a number of witnesses who were allegedly in contempt of the committee (R. 16, and 93 Cong. Rec. 3815.[9]

4. Mr. Justice Jackson, in a dissent in *Frazier* v. *United States,* 335 U. S. 497, 515, joined in by Justices Frankfurter, Douglas, and Murphy, stated that "A government employee cannot today [December 1948] be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every * * * prosecution".

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[9] The reference to the Congressional Record plainly does not support this charge, but shows only that a Congressman asked on the floor of the House whether the Attorney General could be impeached if he failed to do his duty in seeking indictments promptly. 93 Cong. Rec. 3815.

5. The Internal Security Act of 1950 placed sanctions upon "sympathetic association" by government employees with alleged Communist activities.

6. Following the first trial of the perjury prosecution against Alger Hiss, members of Congress introduced a resolution demanding the investigation of Justice Kaufman before whom the case was tried; and "one of the jurors who had refused to vote for conviction against Alger Hiss was required to appeal to law enforcement agencies for protection from those individuals who were harassing him because of that vote" (R. 37).

7. Following an order of the Court of Appeals for the Ninth Circuit granting bail to Harry Bridges, who was accused of falsely denying under oath a past Communist affiliation, United States Senator Langer on the floor of Congress demanded an investigation of the judges involved (R. 37). Cf. *Bridges* v. *United States,* 346 U. S. 209.

8. A "substantial part of the press freely voiced their opinions for public consumption that employees of the federal government should in fact be subjected to the most rigorous and unlimited kind of investigation and interrogation as to their state of mind in respect to their political beliefs, opinion and asosciations, no matter how far removed, and that if there was any question whatsoever or any doubt about what they considered to be 'loyalty', the

culprits should be summarily dismissed from their employment and in fact blacklisted" (R. 38).[10]

9. At the time that the grand jury in the instant case was considering whether to return indictments against the petitioner, and almost a month before the indictments were actually returned, the United States Civil Service Commission reported publicly that 280 government employees had been dismissed as security risks under the Federal Loyalty Program; that 13,202 employees had been the subject of full and complete investigation by the Federal Bureau of Investigation and other agencies; that 1,593 federal employees had resigned while under F. B. I. investigation, and 1,171 federal employees had left their government jobs before the Loyalty Boards had completed their hearings (R. 40).

The petitioner's motion was then supplemented by newspaper views of nine persons, mostly columnists, which appeared principally in 1947,[11]

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[10] We have not attempted to test this proposition in detail, but it seems plain that, as broadly stated, it is both untrue and irrelevant. The press of major relevance to the present case would seem to be the Washington press. We assume that judicial notice can be taken of the fact that it did not take so extreme a position as the petitioner states, and, in fact, that some of that press took exactly the opposite position, as the appendices to petitioner's motion show.

[11] Six of the nine articles appeared in 1947; one in 1948; and two in 1949.

some of which were to the effect that the government loyalty program was creating doubts and fears among government employees (R. 45-63).

It was and is argued that this showing, particularly under the recent ruling of this Court in *Dennis* v. *United States,* 339 U. S. 162, required either a dismissal of the indictment, or a hearing on the issue of bias. The District Court denied both.

2. *The showing thus made was insufficient to require dismissal of the indictment.*

a. The weakness of the showing made by petitioner may be made most clear by pointing out what it does not establish. It does not establish that any particular jurors had any fear that a vote against returning an indictment, made in honest conviction on the basis of the evidence presented, would in any way be noted by any government investigative agency or by those responsible for the enforcement of the Federal Loyalty Program. It does not establish that any government investigative agency or those responsible for the enforcement of the Federal Loyalty Program had ever taken account of such an honest vote. It does not establish that any substantial number of federal employees would have feared that any agency would take cognizance of such an honest vote, since it is perfectly apparent that, even if there were a showing that there were some employees who feared reprisals for their honesty, this would not tend to show that most employees felt that way

or that the particular employees on this grand jury felt that way. Compare *United States* v. *Fields,* 6 F. R. D. 203, 205 (D.D.C.).

These shortcomings in petitioner's showing are particularly important because his case depends on a showing that substantially all of the government employees on the grand jury were probably thus affected by fear. The record shows that 20 grand jurors concurred in voting to return the indictment, and that 10 of these were government employees and 2 more were wives of government employees. (R. 161.) Rule 6 of the Federal Rules of Criminal Procedure requires a concurrence of 12 grand jurors to return an indictment, and further provides that "An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears * * * that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." It follows, therefore, that if four of the government employees—and wives—voted for the indictment, without fear of reprisals, it was valid. This means that petitioner must show not only that there was basis for supposing that some government employees would fear an honest vote, because of the Loyalty Program, but that substantially all of that group, presumably selected at random, would do so. His showing plainly does not establish this; and when it is remembered further that his showing depends on an even more unlikely fear on the part of wives of government employees, it is weakened even further.

Beyond these deficiencies in his allegations which relate to the impact of the Federal Loyalty Program, and government investigative activity related to that program, it is clear that the petitioner's showing is one which would have quite as much impact on those who were not government employees as it would on those who were. It is fair to say that Americans in general do not like Communists or communism, and may anticipate that their neighbors will censure them if they express sympathetic support for either Communists or communism. And if the Loyalty Program does not impose a special burden on federal employees in this respect, and petitioner has not shown that it does, there is no basis for disqualifying a representative District of Columbia grand jury.

But, in any event, it is a far cry from saying that Americans do not like Communists to saying that no one alleged to be a Communist can count on a fair consideration of his case. Petitioner has not demonstrated, and he cannot demonstrate, that there is not left in grand jury panels, whether of government employees or not, the simple fortitude to return only those indictments that are called for by the evidence, in accordance with the specific instructions given to the grand jury, with the oaths taken by the grand jurors, and with the whole concept of fairness in the American political tradition. The petitioner's argument that the jurors would be intimidated into returning a baseless accusation is very little different from a contention that one accused of a particularly vicious murder would be

prejudiced because most people do not like people who commit vicious murders. Both arguments are plainly unsound.

b. The showing of possible bias on the present record is no greater than the showing made in *Dennis* v. *United States,* 339 U. S. 162, and rejected by the Court as insufficient. In the *Dennis* case, this Court rejected an attempt made by Dennis to show that government employees were disqualified by bias from serving as *petit* jurors in a case involving an alleged contempt of the Committee on Un-American Activities. It is submitted that, by the standards of the *Dennis* case, the petitioner's showing is insufficient.

In *Dennis,* the objection to the presence on the jury of government employees was made, first, before the trial, by a motion for transfer from the District of Columbia (see *Dennis* record, O.T. 1949, No. 14, p. 27). An affidavit filed in support of the motion for transfer pointed out that Dennis was general secretary of the Communist Party of the United States, as was well known; alleged the existence of the President's Loyalty Order; and urged the serious consequences of a finding of disloyalty under this Order, even in a case where the finding of disloyalty might be upset. It was emphasized that the charges against Dennis had grown out of an investigation of the House Committee on Un-American Activities, a committee whose members had demanded on the floor of the House of Representatives that there be prosecution, conviction, and imposition of the maximum punishment in the case,

under pain of investigation and punishment for those who interfered (*Dennis,* R. 29). It was stated, indeed, that:

> It is well known that the House Committee on Un-American Activities employs agents to observe and spy upon the activities of Government employees and their associates in order to secure evidence as to whether or not such employees are "sympathetic" to individuals or organizations which the Committee * * * associates with Communism or Communists. The Committee has made a public announcement of this policy and went to the point of stating that it would have its agents at a public meeting * * * addressed by the former Vice-President * * * Henry A. Wallace, in order to take the names of and to identify those who were present * * *.

Finally, the motion concluded with reference to the views of the publicists, Thomas Stokes, Harold Ickes, and I. F. Stone, to the effect that the activities of the Committee were outrageous and were calculated to cow the independence of government employees (*Dennis,* R. 29-32).

Later, at the close of the *voir dire* examination, Dennis challenged for cause all government employees on the basis of the President's Loyalty Order (*Dennis,* R. 64-65). The matter was advanced again on a defense motion for new trial (*Dennis,* R. 348-349, 369) but was overruled (*Dennis,* R. 353). All of the Dennis motions were denied.

In the proceedings in this Court, Dennis outlined further activities of the Committee on Un-American Activities indicating the breadth of its concern with conduct it disapproved, and setting out the views of judges, expressed in opinions, and of publicists, commenting on the restraint on free expression alleged to result from these activities. In addition, the petitioner renewed his contention that Executive Order 9835 completely impaired any impartiality on the part of a government employee.

Nonetheless, in the face of this showing, Mr. Justice Minton for the Court stated that the showing was insufficient, that (339 U.S. at 168):

> * * * [There was no] evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal * * *. Nor was there evidence with respect to the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict.

And later, the Court also stated (at p. 172):

> * * * Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors * * *. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determina-

> tion, the sense of responsibility and the individual integrity by which men judge men.

Thus, it would seem that, in the *Dennis* case, the Court was insisting on a specific demonstration of bias and subjection to fear before it would disqualify a petit juror. We submit that, by the standard there applied, the showing here was clearly insufficient, and, in fact, did no more than assert, as Judge Clark observed in the companion *Emspak* case, the "miasma of fear" which this Court rejected in *Dennis*.

Nothing further that was shown here requires the conclusion that grand jurors who were government employees would fail to live up to their oaths. The Loyalty Order itself, no more here than in *Dennis*, requires the conclusion that government employees were so lacking in courage that they could not determine that there was no probable cause for the indictment of petitioner, if they regarded the evidence as insufficient.

Moreover, the emphasis on the nature and activities of the Committee on U -American Activities is the same here as in *Dennis*. The fact that members of the Committee might have been imperious with respect to the Attorney General, if it was not a basis for disqualifying the *Dennis* petit jury, is not a basis for disqualifying the grand jury which indicted petitioner (even if it is assumed that the jurors were aware of the incident). The assessment in the *Dennis* dissents of the Washington atmosphere, the views of the press, the Hiss and Bridges

incidents, all were as significant to one situation as to the other. Yet, in *Dennis*, they were found not enough. It would seem meaningless to point out that a number of persons had been investigated or discharged under the federal loyalty program, so long as it appears that the number of discharges was relatively small and so long as it does not appear that there is any reason for anyone to believe that the discharges had been based on the honest performance of grand or petit jury duty. We urge again that the data set out in this case is, in substance, a mere repetition—though perhaps more voluminous—of what has already been rejected in *Dennis*.

The standards of bias applied in *Dennis*, moreover, were for the purpose of testing a petit jury in whose hands it lay to make a final determination of guilt. It would seem clear that the standards applicable to a grand jury, a body whose final act is, as has been said, "no more than an accusation" (*cf. Remington* v. *United States*, 191 F. 2d 246, 252, certiorari denied, 343 U. S. 907), need not be as strict as those applicable to a petit jury. It follows, *a fortiori*, that if petitioner's showing would be insufficient under *Dennis*, it is insufficient here. There is no ground for dismissal of the indictment.

3. *A hearing was also properly denied.*

It was incumbent upon the petitioner to show either that the government employees who served as grand jurors in this case were afraid that an honest vote against his indictment would be regarded as evidence of disloyalty, or that there was such a

probability of fear that all government employees should be disqualified. As we have pointed out, petitioner's showing did not warrant dismissal of the indictment. But petitioner also asked for a hearing. The justification and objectives of the hearing demanded by petitioner on this issue are stated in the following portion of an affidavit of his counsel, Mr. Scribner:

> Under the applicable law the defendant must be given an opportunity to demonstrate and inquire into the effect of the President's Loyalty Order upon government employees in general and those in the Grand Jury in particular. The defendant must be given an opportunity to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of government employees including their activities as Grand Jurors or the activities of spouses of Grand Jurors in respect to issues like those involved in the present indictments. I respectfully call to the attention of the Court the threats of the House Committee on Un-American Activities against the Attorney General if indictment in contempt cases were not returned * * *. [R. 16-17.]

The first sentence of this statement demands a hearing to inquire into the impact "of the President's Loyalty Order upon government employees in general and those in the Grand Jury in particular." Viewed alone, this request calls for a

cases seems to be relevant to the present situation. For, even if it be assumed that the return of a grand jury whose bias against the defendant is in fact clearly and specifically shown must be invalidated, regardless of the strength of the *prima facie* case made, it does not follow that an indictment should be set aside where the allegations of bias are conclusionary and general, and where it also appears that the *prima facie* case made could only have resulted in indictment.

V

The Committee on Un-American Activities Was Empowered to Require Petitioner to Answer the Question Involved Here

Petitioner contends that "House Resolution 5 as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment" (Pet. Br. 17). Since petitioner adopts by reference all of the contentions made in Emspak's brief in *Emspak* v. *United States,* No. 67 last Term, No. 9 this Term, we assume that he means to attack the validity of the Resolution on all the grounds set forth by Emspak. In the Government's brief in *Emspak* v. *United States,* we have set forth our contention that the Resolution both on its face and as applied in that case is constitutional. We request the Court to consider those arguments as if they were fully set out here.

As applied to the petitioner in this case, those arguments may be summarized as follows: Each

House of Congress may empower its Committees to obtain information, by compulsion when necessary, to assist the Congress in performing its legislative functions. *McGrain* v. *Daugherty*, 273 U. S. 135, 171-175; *Sinclair* v. *United States*, 279 U. S. 263; *United States* v. *Norris*, 300 U. S. 564, 573. These legislative powers of investigation include the power to scrutinize the administration and effectiveness of existing Federal legislation and the power to inquire into the need for new or supplementary legislation. They cannot be limited to the precise area in which it might be assumed in advance of inquiry that Congress could validly legislate, for not only the need, but also the form and extent, and even the constitutional basis for legislation, often can be ascertained only by investigation of the facts.

The Congressional power to investigate clearly reaches to Communist activity in the United States. This Court has recognized that, prior to the adoption of House Resolution No. 5 in 1949, the Congress had ample grounds not merely to investigate but to legislate with respect to the Communist Party and its activities. See *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Adler* v. *Board of Education*, 342 U. S. 485. *American Communications Association* v. *Douds*, 339 U. S. 382; *Dennis* v. *United States*, 341 U. S. 494.

The intended scope of the Resolution is clear both on its face and from its history. It derives from a 1934 resolution of the House of Representatives

creating the so-called McCormack committee to investigate "(1) the extent, character, and objects of Nazi propaganda activities in the United States, (2)" etc.[12] The work of this committee (H. Rep. 153, 74th Cong. 1st Sess. (1935)) led to the Foreign Agents Registration Act of 1938 (52 Stat. 631, 22 U.S.C. 611 *et seq.*). It is clear that it was the desire of the House of Representatives to investigate both Communist and Nazi propaganda that led to the passage in 1938 of a resolution[13] creating a committee to investigate "the extent, character, and objects of un-American propaganda activities in the United States" (and continuing verbatim with the remainder of the language of the Resolution involved in the instant case). The obvious purpose in using the phrase "*un-American* propaganda" was to reach the political extremism of both Nazism and Communism.[14]

In our brief in *Emspak* v. *United States,* we have made an extended analysis of the words and phrases

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[12] The operative words of the 1934 resolution were

> for the purpose of conducting an investigation of (1) the extent, character, and objects of Nazi propaganda activities in the United States, (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation. [78 Cong. Rec. 4934.]

[13] H. Res. 282, 75th Cong., 3d Sess.

[14] See Ogden, *The Dies Committee* (1943), pp. 38-46; Carr, *The House Committee on Un-American Activities* (1952), pp. 13-17.

"un-American," "subversive propaganda," and "propaganda activities" (Govt. Br. in *Emspak* v. *United States*, 86-95). Here, we reiterate only that in 1938 and since, and with ample justification in recent history, Congress has been concerned not with un-American or subversive propaganda in the abstract but with propaganda in the practical sense of the inducements used in the recruitment of followers in this country for the different brands of political extremism. The heart of the Congressional concern was its conclusion that the Nazi and Communist propaganda activities with which it was primarily concerned were organized and directed by foreign governments to serve the objectives of those governments. From the earliest times, governments have been obliged to take into account and to regulate such activities of other governments, and the power of Congress to do so is beyond dispute

Clearly, therefore, Congress, by Resolution 5 and its predecessors, has intended that the Committee should investigate "the extent, character, and objects" of Communist propaganda activities in the United States. The Committee has done so. And the action of the House of Representatives (and of the Congress) in repeatedly extending the Committee's existence and in enacting legislation on the basis of the Committee's hearings and reports constitutes an overwhelming ratification of the Committee's view that it was authorized to inquire into the propaganda activities of Communists and their affiliates. This ratification does not consist of

counsel at the opening of the hearing in which petitioner appeared as a witness, as follows (in part):[17]

> Mr. TAVENNER: Mr. Chairman, the purpose of this hearing is to inquire into the question of Communist affiliation or association of certain members of Local 601 of the United Electrical, Radio and Machine Workers of America, CIO, which is engaged in work at industrial plants important to the national defense.
>
> The advisability of recommending legislation providing for security standards, and the advisability of tightening present security requirements in industrial plants working on certain Government contracts, was considered by the committee in both its open and executive sessions on June 6, 1949, as a result of the testimony of Leona and Joseph Franey and Loren G. Haas.

Specifically, petitioner asserts that the Committee's authority to investigate Un-American and subversive propaganda "cannot be construed to authorize an investigation into the need to protect defense plants from espionage or sabotage" (Pet. Br. 21). The contention is without merit.

To begin with, petitioner does not deny the power of Congress to investigate Communist infiltration or control of labor unions, as he could not in view of *American Communications Association* v. *Douds, supra.* Indeed, he concedes that the sub-

[17] The full statement of the Committee's counsel is set out *supra*, pp. 7-8.

ject falls "within the long established and well recognized jurisdiction of another House committee" (Pet. Br. 24)—presumably meaning the House Committee on Education and Labor (Pet. Br. 21). It is clear, however, that overlapping jurisdiction of Congressional committees is of concern only to the Congress and cannot be resolved in a lawsuit such as this.

Thus, petitioner is forced to his principal argument that the Committee can investigate propaganda and propaganda activities, *i. e.*, "the dissemination of ideas of a certain kind," but may not investigate "the acts which might be undertaken by those who accept and believe in such propaganda" (Pet. Br. 24). This contention flies in the face of the express authorization in the Resolution to investigate "the extent, character, and objects" of propaganda activities.

Even assuming that the House of Representatives intended only to authorize the Committee to investigate "the extent, character, and objects" of Communist propaganda and "all other questions in relation thereto that would aid Congress in any necessary remedial legislation," and not Communist activities generally, the line of demarcation urged by petitioner is meaningless. While ideas are weapons in war for men's minds, and words "may have all the effect of force" (*Schenck* v. *United States*, 249 U. S. 47, 52), the House of Representatives presumably was not concerned with "the dissemination of ideas of a certain kind" in the abstract. Rather, it was concerned with "the

extent, character, and objects" of Communist propaganda in this country.

We may assume that by the time of the Committee hearing involved here, in 1949, the Committee had little doubt as to the objects of Communist propaganda, *i. e.*, the recruitment of followers who would support the policies of the Soviet Union not only in the political sphere but through political strikes, espionage, and sabotage. But the Committee had a continuing duty to inform itself and the Congress as to where in our society such propaganda or recruiting activities were being carried on, their extent, by whom and by what methods, and for what immediate purposes. Such information is the only basis upon which Congress can determine whether existing legislation is adequate, whether additional legislation is required, and if so, along what lines.

In this context of the Committee's power under the Resolution, the statement of its counsel that the Committee's immediate concern was the "Communist affiliation or association of certain members of Local 601" of UE, and the related question of the adequacy of existing security requirements in defense plants, simply pin-pointed the immediate area of the Committee's investigation of Communist propaganda activities. As we have pointed out in our brief in *Emspak*, pp. 84-86, such a definition simply serves the same specifying function as administrative rules issued pursuant to general statutory standards.

Here, as in *Emspak* (see Govt. Br. pp. 78-95, 66-71), we contend that the Resolution, whether or not supplemented by the statement of the Committee's counsel, satisfies whatever standards of specificity apply to Congressional resolutions, and that petitioner has standing only to challenge the Resolution as applied in this case in the question which was addressed to him.

As applied to this petitioner as a member of Local 601 and a field organizer for the national organization of UE, a labor union which was the collective bargaining agent in important electronics factories, the Committee was entitled as a minimum to ascertain to what extent the union leadership was comprised of Communists, how they had been recruited by the Party, and whether and to what extent and how they were utilizing their positions of union leadership to recruit others into the Communist Party or otherwise to create acceptance of the Party's propaganda and objectives. Under any theory of the Committee's power to investigate Communist propaganda, it was empowered to require petitioner to answer the threshhold question of whether he was a past or present member of the Communist Party.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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vague and subjective inquiry of unlimited scope such as no Federal court has allowed into the constitution and proceedings of a grand jury. In fairness, however, it probably should be read with the following demand for a hearing in which "to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of government employees including their activities as Grand Jurors or the activities as spouses of Grand Jurors in respect to issues like those involved in the present indictments."

The latter proposition describes a condition which, if proved, might require dismissal of the indictment. However, petitioner has failed to make the clear and positive showing which is required to justify a hearing into such a matter. Even if petitioner had asserted generally on information and belief that such investigation of government employees' discharge of their duties as grand jurors had occurred, without more, the showing would be insufficient to justify a hearing. *United States* v. *American Medical Association*, 26 F. Supp. 429 (D.D.C.). Petitioner has not even asserted on information and belief that such investigations have been made; rather, he has expressed merely a desire to inquire into that subject.

The inadequacy of petitioner's demand for a hearing is emphasized by the provisions of Rule 6 of the Federal Rules of Civil Procedure. Rule 6(d) provides that "no person other than the jurors may be present while the grand jury is deliberating or voting." Rule 6(e) provides that "Disclosure of

matters occurring before the grand jury *other than its deliberations and the vote of any juror* may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror * * * may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." (Emphasis supplied.) Under these provisions, a grand juror is forbidden, unless upon the order of the court, to disclose to the United States attorney or anyone else in the executive branch of the government how he or any other grand juror voted on a particular matter.

Moreover, the record which Rule 6(c) requires to be kept by the foreman or another juror designated by him is simply "a record of the number of jurors concurring in the finding of every indictment."

In view of these provisions designed to maintain the traditional secrecy of grand jurors' voting and deliberations in order to protect them from just the kind of harassment conjectured by the petitioner, he must make at least some kind of a showing that grand jurors and executive officers have participated in breaching these barriers of secrecy before he is entitled to a hearing such as he demanded. There is a presumption of regularity in grand jury proceedings, which petitioner would replace with a

presumption of illegal conduct. Courts have not embarked upon the delicate business of inquiring into grand jurors' mental processes and motives upon the basis of such gratuitous assumptions. The simple fact is that the petitioner's showing with respect to the members of the grand jury which indicted him is essentially that which was rejected in *Dennis* v. *United States, supra,* even with respect to a petit jury.

C. *The issue of possible bias loses significance in the present case because no grand jury would have failed to return an indictment.*

It is also apparent that the issue of possible bias in the grand jury cannot be considered except in relation to the question which was before the grand jury. Even as the petitioner states the facts, there was clearly a proper basis for indictment, that is, a *prima facie* case showing that petitioner had refused to answer a pertinent question. The significant evidence before the grand jury, indeed, the only significant evidence, was the transcript of what happened before the Committee. That transcript showed that petitioner was asked, "Are you now or have you ever been a member of the Communist Party?" (R. 97). The transcript also showed, at the very least, that there was a *prima facie* basis for concluding that he had refused to answer those questions, within the meaning of the contempt statute. It is not, and never has been, the function of the grand jury to pass on the subtler considerations

which the petitioner is urging in this Court as determining whether there was a refusal to answer. Cf. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144. A grand jury which, on a written record, decides that there is probable cause to find guilt in a case where three judges of the court below (sitting *en banc*), on the same written record, decide that there is in fact guilt, cannot be said to have been misled by bias.

There are a number of cases which hold that defects in the organization of a grand jury are not a basis for attacking an indictment unless it appears that the accused was prejudiced. *Shreve* v. *United States*, 77 F. 2d 2 (C.A. 9), certiorari denied, 296 U.S. 654 (defendants charged with using mails to defraud held not entitled to abatement on ground that one of grand jurors was prejudiced where there was sufficient evidence in record to sustain charge made in indictment); *Wagner* v. *United States*, 67 F. 2d 656 (C.A. 9) (plea in abatement objecting to organization of grand jury without, *inter alia*, showing how defendants were injured or prejudiced held insufficient). See also *United States* v. *Parker*, 103 F. 2d 857, 859 (C.A. 3), certiorari denied, 307 U. S. 642; *Morrison* v. *United States*, 71 F. 2d 358, 359 (C.A. 5), certiorari denied, 293 U. S. 589; *United States* v. *Benson*, 31 Fed. 896, 901 (C.C.D. Calif.). While all of these cases except *Shreve* deal with technical defects in the grand jury organization, and *Shreve* appears to involve the qualifications of only one grand juror, this line of

a single debate upon a recommended contempt citation which, in *United States* v. *Rumely*, 345 U. S. 41, 47-48, was held to be an insufficient basis for finding a ratification of a committee's interpretation of its authority. Here, the ratification consists of repeated renewal of the Committee's existence, as well as the adoption by the House of contempt citations in this and other cases. More important, the House of Representatives and the Congress have enacted various statutes which are rooted at least in part in the Committee's (and the predecessor McCormack Committee's) investigations and reports. These statutes include the Foreign Agents Registration Act [15] (52 Stat. 631; 22 U. S. C. 611 *et seq.*), the Voorhis Act (54 Stat. 1201, 18 U. S. C. 2386) sponsored by a member of the Committee, and the Smith Act combined with the Alien Registration Act.[16] In particular, the registration provisions of the Subversive Control Act of 1950 have much of their origin in the Committee's work. Indeed, they originated in bills introduced by Representatives Mundt and Nixon who were members of the Committee. See H. Rep. 1844, 80th Cong., 2d Sess., and Sen. Rep. 1358, 81st Cong., 2d Sess., pp. 4-6. More recently, Congress has enacted the

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[15] The origin of the Foreign Agents Registration Act in the recommendations of the McCormack Committee was recognized by this Court in *Viereck* v. *United States*, 318 U.S. 236, 244.

[16] The relationship between these statutes and the investigations of the Committee is described in detail in the Government's brief in *Dennis* v. *United States*, No. 336, Oct. Term, 1950, pp. 176-192.

Communist Control Act of 1954 (Pub. Law, 637, 83d Cong., 2d Sess., 68 Stat. 775) which, *inter alia*, deprives of the protection and benefits of the National Labor Relations Act unions found to be Communist dominated. The report of the House Committee on Un-American activities on H. R. 9838, the House version of this recent legislation, states that it is based in large part upon the Committee's investigations, including the *Hearings Regarding Communist Infiltration of Labor Unions* in which this petitioner and Emspak were called as witnesses, H. Rep. 2651, 83d Cong., 2d Sess., p. 18.

This mass of legislation which Congress has enacted upon the basis of the Committee's investigations and those of other committees of the Congress also sufficiently disposes of the petitioner's argument that the Committee's operations, including the hearing involved here, serve only as an alleged exposure system, and have no bearing upon actual or potential legislation. Statements of members of the Committee that its purpose is merely to expose Communists cannot prevail over the authorization of House of Representatives in the Resolution to investigate "all other questions in relation thereto that would aid Congress in any necessary remedial legislation," and over the record of significant legislation largely based upon the Committee's work.

The petitioner also contends that the Committee was without authority under the Resolution to investigate Communist infiltration into defense industries. (Pet. Br. 18-27.) This contention presumably refers to the statement of the Committee's